Supreme Court, U.S.
FILED
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CLERK

No. 99-1931

In The
Supreme Court of the United States

JAMES F. LEWIS,

Petitioner,

v.

LEWIS & CLARK MARINE, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed February 8, 2000
Certiorari Granted May 30, 2000

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266 pp

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U.S. District Court
Eastern District of Missouri (Eastern)

3/24/98	1	COMPLAINT for exoneration from or limitation of liability; # Counts: 1 # Consents: 2, service by publication will be filed (aeh) [Entry date 03/26/98] [Edit date 03/30/98]
3/24/98	2	TRACK INFORMATION STATEMENT filed by plaintiff Lewis & Clark Marine; track 3 preferred (aeh) [Entry date 03/26/98]
3/25/98	3	RECEIPT # s98-005188 in the amount of $150.00 for civil filing fee (aeh) [Entry date 03/26/98]
5/8/98	4	MOTION by plaintiff Lewis & Clark Marine for order approving stipulation for costs and security for value, directing issuance of notice, and restraining suits (kks) [Entry date 05/13/98] [Edit date 05/13/98]
5/8/98	5	ORDER by Honorable Catherine D. Perry granting motion for order approving stipulation for costs and security for value, directing issuance of notice, and restraining suits [4-1]; see order for particulars (cc: all counsel) (kks) [Entry date 05/13/98]
5/8/98	6	STIPULATION FOR COSTS by plaintiff Lewis & Clark Marine re [5-1] (kks) [Entry date 05/13/98]

5/11/98	7	NOTICE OF COMPLAINT FOR EXONERATION FROM OR LIMITATION OF LIABILITY by rev, Clerk of Court (kks) [Entry date 05/13/98]
5/11/98	8	SECURITY FOR VALUE by plaintiff Lewis & Clark Marine with attached notary acknowledgement for surety (American Home Assurance Company) and certified power of attorney (kks) [Entry date 05/13/98]
5/11/98	9	RECEIPT # S98-006508 in the amount of $250 for cost Bond-local (kks) [Entry date 05/13/98]
5/15/98	10	MOTION by claimant James, Lewis to dismiss, or to transfer case for improper venue w/memorandum in support, exhibits 1, 2 and proposed order attached. (dlb) [Entry date 05/18/98]
5/22/98	11	MOTION (labeled mtn to continue) by plaintiff Lewis & Clark Marine to extend the time, up to and including 5/29/98, in which to respond to mtn to dismiss or transfer (kks)
5/26/98	12	RETURN LETTER from Clerk to Christopher Swenson re: motion for continuance (dlb)
5/26/98	–	RULED DOCUMENT by Mag Judge Mary Ann L. Medler granting plntf's motion to extend the time, up to and including 5/29/98, in which to respond to mtn to dismiss or transfer [11-1] (cc: all counsel) (kks) [Entry date 05/27/98]
5/29/98	13	MEMORANDUM by plaintiff Lewis & Clark Marine in opposition to motion to

		dismiss [10-1] w/exhibits A,B attached. (dlb) [Entry date 06/01/98]
6/9/98	14	MOTION (Labeled "Notice of Voluntary Dismissal") by claimant James Lewis to withdraw motion to dismiss or transfer for improper venue (kks)
6/9/98	15	RULED DOCUMENT by Mag Judge Mary Ann L. Medler granting motion to withdraw motion to dismiss or transfer for improper venue [14-1] withdrawing motion to dismiss [10-1], withdrawing motion to transfer case for improper venue [10-2] (cc: all counsel) (kks)
6/9/98	16	ANSWER TO COMPLAINT FOR EXONERATION FROM OR LIMITATION OF LIABILITY by claimant James. Lewis to [1-1] (dlb) [Entry date 06/11/98]
6/9/98	17	CLAIM FOR DAMAGES FOR INJURY by James Franklin Lewis (dlb) [Entry date 06/11/98]
6/9/98	18	MOTION by claimant James Lewis to dissolve restraining order w/memorandum in support attached. (dlb) [Entry date 06/11/98]
6/25/98	19	MOTION by plaintiff Lewis & Clark Marine to extend the time up to and including 7/8/98 in which to respond to claimant Lewis' mtn to dissolve restraining order (kks) [Entry date 06/26/98]
6/25/98	20	RULED DOCUMENT by Mag Judge Mary Ann L. Medler granting plntf's motion to extend the time up to and including 7/8/98 in which to respond to claimant Lewis' mtn to dissolve restraining order

[19-1]; Resp to court ddl 7/8/98 (cc: all counsel) (kks) [Entry date 06/26/98]

6/25/98 21 RULE 16 ORDER by Mag Judge Mary Ann L. Medler; standard (2) track; Rule 16 Conference 7/30/98; joint scheduling plan ddl 7/23/98; Magistrate Consent Due ddl 7/23/98 (cc: all counsel) (dlb) [Entry date 06/26/98]

7/8/98 22 RESPONSE by plaintiff Lewis & Clark Marine to motion to dissolve restraining order [18-1] (lah) [Entry date 07/09/98]

7/17/98 23 MOTION by claimant James. Lewis to extend the time until 7/24/98 to respond to petitioner's memorandum in opposition to dissolve restraining order (bdc) [Entry date 07/20/98]

7/22/98 24 RULED DOCUMENT by Mag Judge Mary Ann L. Medler granting motion to extend the time until 7/24/98 to respond to petitioner's memorandum in opposition to dissolve restraining order [23-1]. SO ORDERED, MLM, 7/22/98. (cc: all counsel) (bdc)

7/24/98 25 REPLY by claimant James . Lewis to response to motion to dissolve restraining order [18-1] (lah) [Entry date 07/27/98]

7/30/98 26 FULL CONSENT has been received by plaintiff Lewis & Clark Marine, claimant James . Lewis [0-0], [0-0] (arl) [Entry date 08/03/98]

7/30/98 – JOINT PROPOSED SCHEDULING PLAN by plaintiff Lewis & Clark Marine, claimant James . Lewis (FAX TO BE FILED IN

LIEU OF ORIGINAL, MLM) (arl) [Entry date 08/03/98]

7/30/98 28 MINUTES: before Mag Judge Mary Ann L. Medler Rule 16 Conference held on 7/30/98; CMO to follow; proceedings started: 9:05 – ended: 9:30 (arl) [Entry date 08/03/98]

7/31/98 27 ORDER by Mag Judge Mary Ann L. Medler – Petitioner Lewis & Clark Marine, Inc. is granted 10 days from the date of this order to file a sur-reply to claimant James F. Lewis' Reply in support of his Motion to dissolve Injunction. (cc: all counsel) (arl) [Entry date 08/03/98]

7/31/98 29 CASE MANAGEMENT ORDER by Mag Judge Mary Ann L. Medler; standard(2) track; motion to add party ddl set for 10/15/98; Disc completion ddl set for 6/1/99; disp motion ddl set for 6/1/99; non-jury trial set for 8/16/99 at 9:00; pt comp ddl set for 7/27/99 (cc: all counsel) (arl) [Entry date 08/03/98]

8/18/98 30 SUR-REPLY by plaintiff Lewis & Clark Marine to Claimant's reply in support of Claimant's motion to dissolve restraining order and to stay this exoneration/limitation action re [18-1] LEAVE TO FILE GRANTED (MLM) (lah) [Entry date 08/19/98]

8/18/98 31 RULE DOCUMENT by Mag Judge Mary Ann L. Medler granting filing of sur-reply [30-1] (cc: all counsel) (lah) [Entry date 08/19/98]

12/22/98 32 MEMORANDUM AND ORDER: by Mag Judge Mary Ann L. Medler granting

claimant James Franklin Lewis' motion to dissolve restraining order [18-1]. IT IS FURTHER ORDERED that the restraining order entered by the Court on 5/8/98 doc. #[5-1] is hereby dissolved. IT IS FURTHER ORDERED that the instant cause of action is STAYED pending final resolution of the cause of action filed by the Claimant in the Circuit Court of Madison County, State of Illinois, No. 98-L-233. IT IS FINALLY ORDERED that the Clerk of the Court shall administratively CLOSE this file, which shall be subject to reopening on motion of either party as warranted terminating case (cc: all counsel) (bdc) [Entry date 12/24/98]

12/22/98 – PUBLISHED – order dated: 12/22/98 (lah) [Entry date 01/05/99]

1/21/99 33 NOTICE OF APPEAL filed by plaintiff Lewis & Clark Marine re: the District Court decision; [32-2] fee: $105.00 (lah)

1/21/99 34 RECEIPT #99-002838 in the amount of $105.00 for appeal (lah)

1/25/99 – DELIVERED TO USCA – 1 Civil Appeal Cover Sheet, 2 Certified Copies of Notice of appeal filed by Plaintiff, 2 Certified Copies of Clerk's Docket entries and 2 copies of MEMO/ORDER (MLM) filed 12/22/98. Copy of NOA, Clerk's docket entries and USCA letter to parties. Copy of NOA, Clerk's docket entries and ORDER being appealed sent to LEXIS-NEXIS, WEST GROUP, LAWYERS WEEKLY and BUREAU OF NATIONAL AFFAIRS. (pam)

2/12/99 35 NOTIFICATION AND BRIEFING SCHEDULE (USCA) FILED USCA #99-1346EMSL Mthd of Appndx Prep Due: 2/22/99 Transcript Due: n/a Designations Due: 3/4/99 Briefs Due: 3/24/99 . . . (bdc) [Entry date 02/16/99]

[END OF DOCKET: 4:98cv503]

US Court of Appeals for the Eighth Circuit

99-1346 In Matter of Lewis & v. James F. Lewis, et al

2/12/99 Civil Case Docketed. Dist. Ct. Office: St. Louis (llb)

2/12/99 CERTIFIED copies notice of appeal, docket entries, [99-1346] and judgment dated 12/22/98 from district court [1094714] (llb)

2/12/99 BRIEFING SCHEDULE: [99-1346] Method of Apndx due on 2/22/99; DR aplnt due on 2/22/99; Aplee DR due on 3/4/99; Joint Apndx due on 3/24/99; Aplnt brief due on 3/24/99; Aplee brief due on 4/23/99; Reply brief due on 5/7/99; (llb)

2/17/99 APPEARANCE for appellant, attorney James Vincent O'Brien [99-1346] [1105499] (jpp)

2/22/99 APPEARANCE for appellee, attorney Roy C. Dripps [99-1346] [1105394] (jpp)

2/22/99 DESIGNATION of record received from Appellant Lewis & Clark. Type of appendix: joint [99-1346] (jpp)

3/24/99 BRIEF FILED – Brief of Appellant – Lewis & Clark 20 pgs w/addendum – 10 copies – w/service 3/24/99. Defects: point typesize too small [99-1346] [1113336] (jpp)

3/24/99 RECORDS received: Joint Appendix, consisting of 1 Volume(s) 3 copies [99-1346] (jpp)

3/24/99 BRIEF FILED – Corrected brief of Appellant Lewis & Clark w/addendum 10 copies – 24 pages – w/service 3/24/99 [99-1346] [1124303] (jpp)

4/21/99 Brief Correction(s) (in form of corrected brief) received from appellant Lewis & Clark. Correction(s): point typesize. [99-1346] (jpp)

4/23/99 BRIEF FILED – Brief of Appellee – James F. Lewis. 35 pgs (7,722 words) – w/addendum – 10 copies – w/service 4/23/99. [99-1346] [1123970] (jpp)

4/23/99 MOTION of aplee, James F. Lewis, for leave to file third stipulation. [99-1346] [1133013], FOR CAL. w/service 4/23/99 (jpp)

4/27/99 TO SCREENING to rw. [99-1346] (dmh)

4/27/99 RETURNED from Screening – no action taken. [99-1346] (dmh)

4/27/99 RE-SENT case to screening – to mg. [99-1346] (dmh)

5/7/99 BRIEF FILED – Reply brief – Lewis & Clark . 15 pgs – 10 copies – w/service 5/7/99 . [99-1346] [1131362] (jpp)

5/10/99 RETURNED from Screening (15) [99-1346] (dmh)

5/17/99 ORDER filed: Appellee's motion for leave to file third stipulation is hereby ordered taken with the case for consideration by the panel to which this case is submitted for disposition on the merits. [1133020], FOR CAL. (jpp)

7/23/99 *SET FOR ARGUMENT* – September in St. Louis. [99-1346] (tab)

9/16/99 ARGUED AND SUBMITTED IN ST. LOUIS TO JUDGES Theodore McMillian, Circuit Judge, Diana E. Murphy, Circuit Judge, John R. Tunheim, Visiting Judge, from Minneapolis, MN. James Vincent O'Brien for Appellant

Lewis & Clark . Roy C. Dripp[illegible] for appellee James F. Lewis, Appellee James F. Lewis . Rebuttal by: James V. O'Brien . RECORDED. [99-1346] (srd)

11/5/99 THE COURT: Theodore McMillian, Diana E. Murphy, John R. Tunheim. OPINION FILED by Theodore McMillian PUBLISHED [99-1346] [1198193] (paw)

11/5/99 JUDGMENT: Theodore McMillian, Diana E. Murphy, John R. Tunheim: The judgment of the lower court is REVERSED and REMANDED in accordance with the opinion. [99-1346] [1198195] (paw)

11/19/99 PETITION for REHEARING with petition for rehearing en banc. Filed by Appellee James F. Lewis, w/service, TO COURT. [99-1346] (paw)

12/8/99 JUDGE ORDER: denying petition for Rehearing with petition for rehearing en banc [1203258-1] filed by James F. Lewis Petition for panel Rehearing is also denied. [99-1346] [1209314] PUBLISHED (paw)

12/15/99 MANDATE ISSUED [99-1346] (paw)

12/17/99 RECEIPT for Mandate. [99-1346] [1213597] (dkm)

2/14/00 U.S. Supreme Court notice regarding petition for writ of certiorari. Filed in the Supreme Court on 2/8/00. Supreme Ct. Case No.: 99-1331 [99-1346] [1233115] (paw)

6/5/00 Notification from Supreme Court dated 05/30/00 stating that they had entered an order granting Supreme Court notice for certiorari [1233115-1] [99-1346] [1275652] in Sup. Ct. No. 99-1331. [99-1346] (srd)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	Cause No. _____ In Admiralty 4:98CV00503MLM

COMPLAINT FOR EXONERATION FROM OR LIMITATION OF LIABILITY

(Filed Mar. 24, 1998)

COMES NOW plaintiff, Lewis & Clark Marine, Inc. ("Lewis & Clark"), as owner or owner *pro hav vice* of the M/V KAREN MICHELLE, and for its Complaint for Exoneration from or Limitation of Liability, pursuant to 46 U.S.C. § 181 *et seq.*, states:

1. This action arises under the laws of the United States providing for limitation of a vessel owner's liability (46 U.S.C. §§ 181-195 inclusive) and the various statutes, rules and regulations relating thereto. This is an admiralty and maritime claim within the meaning of Rule 9(h), Fed.R.Civ.P. and for the purposes of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims.

2. At all times relevant hereto, plaintiff Lewis & Clark was and is a Missouri corporation organized and existing under and by virtue of law with its principal place of business in Granite City, Illinois, and was at all

times relevant hereto the owner or owner *pro hac vice* of the M/V KAREN MICHELLE.

3. At all times relevant to the subject matter of the exoneration or limitation sought, the M/V KAREN MICHELLE was based out of the Louisiana Dock at St. Louis Harbor and was on a one day voyage during which it was making a northbound tow in connection with the M/V WENDY L. James Lewis boarded the M/V KAREN MICHELLE at 6:00 a.m. on March 17, 1998 at the Louisiana Dock, St. Louis Harbor.

4. At all material times, the M/V KAREN MICHELLE was a 1350 h.p. twin screw river towboat used on the navigable waters of the United States, and which at all times mentioned herein was tight, staunch, strong and seaworthy in all respects.

5. Prior to the time of the injury herein described, plaintiff used due diligence to ensure that the M/V KAREN MICHELLE was in fact, tight, staunch, strong, and in all respects seaworthy and fit for the use in which it was engaged.

6. On or about March 17, 1998, James Lewis was working as a deckhand aboard the M/V KAREN MICHELLE at or near Mile 171.9 of the Upper Mississippi River during the course of the aforesaid voyage. In the course of work, James Lewis was injured when he purportedly tripped over a wire and injured his back. James Lewis ended his tour March 17, 1998, at or about 9:15 a.m. when he was returned to the Louisiana Dock by Pilot Rich Garner. James Lewis was taken to Midwest Occupational Medicine to be examined and treated.

7. At the time of the alleged injury aforesaid, the value of the M/V KAREN MICHELLE did not exceed the sum of Four Hundred and Fifty Thousand Dollars ($450,000.00), and the plaintiff annexes hereto and makes a part hereof an affidavit as to the value of the M/V KAREN MICHELLE immediately after the incident. Upon information and belief, there was no "pending freight" within the intended meaning of 46 U.S.C. § 183. Upon information and belief, plaintiff states that there are no liens upon the M/V KAREN MICHELLE prior to or paramount to any liens which may have accrued by reason of the matters described in this Complaint.

8. The losses and damages allegedly resulting from the matters aforesaid were not caused or contributed to by any fault or neglect on the part of the plaintiff, nor of anyone for whose act plaintiff is or may be responsible, or on the part of the M/V KAREN MICHELLE.

9. The alleged losses and damages above referred to were done, occasioned and incurred without any fault on the part of the plaintiff and without plaintiff's privity or knowledge. Plaintiff denies any liability for any claim of loss or damage occasioned by or resulting from the matters and happenings above recited and avers that plaintiff has a valid defense to all such claims. Plaintiff desires to contest plaintiff's liability for all such claims, and, therefore, show that plaintiff is entitled to exoneration from any liability. Should this Honorable Court, however, adjudge that plaintiff is in any way liable to any extent in the premises, then plaintiff claims the benefit of limitation of liability provided for in 46 U.S.C. §§ 181-195. Subject to an appraisal of plaintiff's interest in the M/V KAREN MICHELLE on a reference, should one be

ordered, plaintiff offers and will file an *ad interim* stipulation, with approved corporate surety, for the payment into Court, whenever the Court shall so order, of the aggregate amount of plaintiff's interest in the M/V KAREN MICHELLE, and pending freight, if any, with interest at the rate of six percent (6%) per annum from the date of the security.

WHEREFORE, plaintiff prays:

A. That this Honorable Court enter an order approving the Stipulation for Costs in the amount of Two Hundred and Fifty Dollars ($250.00);

B. That the Honorable Court enter an order approving the Security for Value fled by plaintiff in the amount of Four Hundred and Fifty Thousand Dollars ($450,000.00) with six percent (6%) per annum interest from the date of such stipulation, pending the appraisement of the Court of the amount of plaintiff's interest in the M/V KAREN MICHELLE and its pending freight, if any, as to quantum, form and surety;

C. That upon the filing of the foregoing, this Court issue an injunction restraining the commencement or prosecution of any and all actions, suits or legal proceedings of any kind against plaintiff, the M/V KAREN MICHELLE or its underwriters or any other property owned by plaintiff arising out of the matters and happenings recited in the above and foregoing Complaint other than in these proceedings.

D. That the Court cause a notice to be issued to all persons, firms and corporations having or alleging to have claims by reason of the matters and happenings recited in the above

and foregoing Complaint, admonishing them to appear and file their claims with the Clerk of this Honorable Court on or before the date to be fixed by this Court and as specified in the notice or be forever barred and permanently enjoined from making and filing any such claims; and to answer, all and singular, the premises of this Complaint;

E. That the Court adjudge the plaintiff, the M/V KAREN MICHELLE, not liable for any damages, demands or claims whatsoever in consequence of or arising out of or connected with the matters and happenings recited in the above and foregoing Complaint.

F. That, in the alternative, if this Court should adjudge the plaintiff is liable to any extent in the premises, the Court then adjudge that the liability of the plaintiff be limited to the amount of its interest in the M/V KAREN MICHELLE, plus pending freight, if any, at the time of the alleged injury aforesaid; and in that event, the amount paid into the Court as representing the value of the plaintiff's interest in the M/V KAREN MICHELLE, and then pending freight, if any, shall be divided pro rata among any claimants having made due proof of their represented claims; and that a decree be entered discharging plaintiff, the M/V KAREN MICHELLE from any liability in consequence of or arising out of or connected with the matters and happenings recited in the above and foregoing complaint;

G. That plaintiff may have such other and further relief in the premises as may be just and proper and this court competent to grant.

LEWIS, RICE & FINGERSH, L.C.

By /s/ Christopher C. Swenson
James V. O'Brien, #3973
Christopher C. Swenson, #74100

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St. Louis, Missouri 63102
(314) 444-7600
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Attorneys for Plaintiff
Lewis & Clark Marine, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner of the M/V KAREN MICHELLE for Exoneration from or Limited Liability	)	Cause No. _____ In Admiralty

AFFIDAVIT OF VALUE

STATE OF MISSOURI)
) SS.
CITY OF ST. LOUIS)

I, PETER C. MERRILL, being duly sworn, depose that I am an independent marine surveyor and am President of Merrill Marine Services, Inc., and I am familiar with and know the value of the M/V KAREN MICHELLE, and state that on or about March 17, 1998, the value of the M/V KAREN MICHELLE was *Four Hundred Fifty Thousand Dollars* ($450,000.00), to the best of my knowledge, information and belief.

/s/ Peter C. Merrill
Peter C. Merrill

Subscribed and sworn to before me this 24th day of March, 1998.

/s/ Peggy Illegible
Notary Public

My commission expires: March 5, 1999.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

BOND NO. 19-35-51

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	Cause No. 4:98CV00503 MLM In Admiralty

SECURITY FOR VALUE

(Filed May 11, 1999)

WHEREAS, Lewis & Clark Marine, Inc., as owner of the M/V KAREN MICHELLE has filed a Complaint for Exoneration From or Limitation of Liability in this court pursuant to 46 U.S.C. § 181 *et seq.* in respect to an incident which allegedly occurred on or about March 17, 1998, at or near Mile 171.9 of the Upper Mississippi River, and the alleged consequential losses, damages or injuries, and those losses particularly set forth in the above-referenced Complaint; and

WHEREAS, Lewis & Clark has set forth in its Complaint for Exoneration From or Limitation of Liability that the value of the M/V KAREN MICHELLE and its pending freight, if any, do not exceed $450,000.00 and has elected to post security for such value, and for costs;

NOW, THEREFORE, Lewis & Clark Marine, Inc. and its surety, American Home Assurance Company, hereby

submit themselves to the jurisdiction of this court, and together with Lewis & Clark Marine, Inc. as principal, hereby enter their security for value in the amount of $450,000.00, together with interest at six percent (6%) per annum from the date hereof, and agree to abide by all Orders of the Court, interlocutory and final, and to pay the amount awarded by a final decree rendered by this Honorable Court or by an Appellate Court if an appeal intervenes, together with costs, up to the amount specified herein, with interest aforesaid.

LEWIS & CLARK MARINE, INC.
Principal

By: /s/ Illegible

Title: /s/ President
hereunto authorized

AMERICAN HOME ASSURANCE COMPANY

Surety

By: /s/ Renee A. Folkerts
Renee A. Folkerts

Title: Attorney-In-Fact
hereunto authorized

NOTARY ACKNOWLEDGEMENT
FOR SURETY

State of Missouri

City of St. Louis
County

On the 5th day of May 1998 before me personally appeared Renee A. Folkerts to me known, who being by me duly sworn, did depose and say the he/she is an attorney in fact for American Home Assurance Company and that he/she did execute the bond attached hereto and that he/she acknowledged to me that he/she executed the same as and for the act and deed of said firm.

/s/ Marilyn K. Garmer
MARILYN K. GARMER
NOTARY PUBLIC - STATE OF
MISSOURI
ST. LOUIS COUNTY
MY COMMISSION EXPIRES
AUG. 21, 2000

POWER OF ATTORNEY

American Home Assurance Company
National Union Fire Insurance Company of Pittsburgh, Pa.
Principal Bond Office: 175 Water Street,
New York, N.Y. 10038

No. 22-B-0489S

KNOW ALL MEN BY THESE PRESENTS:

That American Home Assurance company, a New York corporation, and National Union Fire Insurance company of Pittsburgh, Pa., a Pennsylvania corporation, does each hereby appoint

–Renee A. Folkerts, Sandra L. Ham: of St. Louis, Missouri–

its true and lawful Attorney(s)-in-Fact, with full authority to execute on its behalf bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, issued in the course of its business, and to bind the respective company thereby.

IN WITNESS WHEREOF, American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, Pa. have each executed these presents

[SEAL] [SEAL] this 12th day of March, 1998.

/s/ Lawrence W. Carlstrom
Lawrence W. Carlstrom, Senior
Vice President
National Union Fire Insurance
Company of Pittsburgh, PA.
Vice President, American Home
Assurance Company

STATE OF NEW YORK }
COUNTY OF NEW YORK }ss.

On this 12th day of March, 1998 before me came the above named officer of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, Pa., to me personally known to be the individual and officer described herein, and acknowledged that he executed the foregoing instrument and affixed the seals of said corporations thereto by authority of his office.

DEBORAH A. HAYNE /s/ Deborah A. Hayne
Notary Public, State of New York
No. Illegible
Qualified in Suffolk County
Commission Expires June 30, 1999

CERTIFICATE

Excerpts of Resolutions adopted by the Boards of Directors of American Home Assurance Company and National Union Fire Insurance Company of Pittsburgh, Pa. on May 18, 1976:

"RESOLVED, that the Chairman of the Board, the President, or any Vice President be, and hereby is, authorized to appoint Attorneys-in-Fact to represent and act for and on behalf of the Company to execute bonds, undertakings, recognizances and other contracts of indemnity and writings obligatory in the nature thereof, and to attach thereto the corporate seal of the Company, in the transaction of its surety business;

"RESOLVED, that the signatures and attestations of such officers and the seal of the Company may be affixed to any such Power of Attorney or to any certificate relating thereto by facsimile, and any such Power of Attorney or certificate bearing such facsimile signatures or facsimile seal shall be valid and binding upon the Company when so affixed with respect to any bond, undertaking, recognizance or other contract of indemnity or writing obligatory in the nature thereof;

"RESOLVED, that any such Attorney-in-Fact delivering a secretarial certification that the foregoing resolutions still be in effect may insert in such certification the date thereof, said date to be not later than the date of delivery thereof by such Attorney-in-Fact."

I, Elizabeth M. Tuck, Secretary of American Home Assurance Company and of National Union Fire Insurance Company of Pittsburgh, Pa. do hereby certify that the foregoing excerpts of Resolutions adopted by the Boards of Directors of these corporations, and the Powers of Attorney issued pursuant thereto, are true and correct, and that both the Resolutions and the Powers of Attorney are in full force and effect.

IN WITNESS WHEREOF, I have the hereunto set my hand and affixed the facsimile seal of each corporation

[SEAL] [SEAL] this 5th day of May, 1998.

/s/ Elizabeth M. Tuck
Elizabeth M. Tuck, Secretary

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	Cause No. 4:98CV00503 MLM In Admiralty

STIPULATION FOR COSTS
(Filed May 11, 1998)

WHEREAS, a complaint has been filed in this Court by Lewis & Clark Marine, Inc., as owner of the M/V KAREN MICHELLE, praying for exoneration from or limitation of liability, under the provisions of Title 46, United States Code, §§ 181 *et seq.* for the reasons and causes in said Complaint mentioned; and praying that a notice may issue to all persons asserting claims with respect to which the said complaint seeks limitation and the said plaintiff and its surety, parties hereto, hereby consenting and agreeing that, in case of default or contumacy on the part of petitioner or its surety, execution may issue against their goods chattels and lands, for the sum of TWO HUNDRED FIFTY AND NO/100 DOLLARS ($250.00).

NOW, THEREFORE, it is hereby stipulated and agreed for the benefit of whom it may concern that the petitioner herein and the stipulation as signed shall be

and each of them is hereby bound in the sum of TWO HUNDRED FIFTY AND NO/100 DOLLARS ($250.00), conditioned that petitioner above named shall pay all costs and expenses which shall be awarded against it by the decree of this Court or upon appeal by any appellate court.

LEWIS & CLARK MARINE, INC.
By: /s/ (illegible)
Principal

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	Cause No. 4:98CV00503 MLM In Admiralty

NOTICE OF COMPLAINT FOR EXONERATION FROM OR LIMITATION OF LIABILITY

(Filed May 11, 1998)

Notice is hereby given that Lewis & Clark Marine, Inc. has filed a Complaint pursuant to Title 46 U.S.C. § 181-195, inclusive, and the various statutes, rules and regulations supplemental thereto, and amendatory thereof, claiming the right to exoneration from or limitation of liability for all claims arising out of the incident involving the M/V KAREN MICHELLE at or near Mile 171.9 of the Lower Mississippi River, on or about March 17, 1998. More specifically, on or about March 17, 1998, James Lewis was working aboard said vessel as a deckhand and in the course thereof sustained an injury.

All persons having such claims must file them under oath as provided by Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims of the United States Supreme Court with the Clerk of the Court and serve on or mail to plaintiff's attorneys, James V. O'Brien, Christopher C. Swenson, and Lewis, Rice & Fingersh, L.C., 500 North Broadway, Suite 2000, St. Louis, Missouri

63102, a copy thereof on or before June 12, 1998, or be defaulted. Personal attendance is not required.

Any claimant desiring to contest the claims of plaintiff must file an Answer to said Complaint as required by Rule F(4) and F(5) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the United States Supreme Court, and serve on or mail a copy to plaintiff's attorneys.

/s/ (illegible)
Clerk of the United States District Court for the Eastern District of Missouri

By: (illegible)
Deputy Clerk

5-11-98
Date

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	Cause No. 4:98CV00503 MLM In Admiralty

MOTION FOR ORDER APPROVING STIPULATION FOR COSTS AND SECURITY FOR VALUE, DIRECTING ISSUANCE OF NOTICE, AND RESTRAINING SUITS

(Filed May 11, 1998)

COMES NOW plaintiff, Lewis & Clark Marine, Inc., as owner of the M/V KAREN MICHELLE, by its attorneys, LEWIS, RICE & FINGERSH, L.C., and pursuant to Supplemental Rule F for Certain Admiralty and Maritime Claims moves the Court for an order:

1. Approving the Stipulation for Costs in the amount of $250.00 as to amount, terms and security.

2. Approving the security for value for plaintiff's interest in the vessels in the amount of Four Hundred and Fifty Thousands Dollars ($450,000.00) as to amount, terms and security.

3. Directing the Clerk of the Court to issue a notice to all persons asserting claims with respect to the casualty for which the Complaint herein seeks exoneration from or

limitation of liability, admonishing them to file their respective claims with the Clerk of the Court and to serve upon the attorneys for the plaintiff a copy thereof on or before June 12, 1998.

4. Enjoining the commencement or further prosecution of any action or proceeding against the plaintiff, the M/V KAREN MICHELLE or its Underwriters or against any of the plaintiff's property with respect to any claim subject to limitation in this action.

5. Directing publication of notice of this action for four successive weeks prior to the date fixed for filing claims.

LEWIS, RICE & FINGERSH, L.C.

By /s/ Christopher C. Swenson
James V. O'Brien, #3973
Christopher C. Swenson, #74100

500 North Broadway, Suite 2000
St. Louis, Missouri 63102
(314) 444-7600
(314) 444-7788 (FAX)

Attorneys for Plaintiff Lewis & Clark Marine, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	Cause No. 4:98CV00503 MLM In Admiralty

ORDER APPROVING STIPULATION FOR COSTS AND SECURITY FOR VALUE AND DIRECTING ISSUANCE OF NOTICE, AND RESTRAINING SUITS

(Filed May 11, 1998)

Plaintiff Lewis & Clark Marine, Inc., having filed its Complaint for Exoneration From or Limitation of Liability in respect to any loss, damage, expense or injuries arising out of alleged injuries, accidents or casualties which allegedly occurred on or about March 17, 1998, at or near Mile 171.9 of the Upper Mississippi River, all of which said alleged injuries, accidents and casualties are described in the Complaint in detail, and plaintiff having stated in the Complaint the facts and circumstances upon which the exoneration from or limitation of liability are claimed, and having therein prayed an appraisal of its interest in the M/V KAREN MICHELLE and in the pending freight, if any, and for the amount of the appraised value or, pending the appraisal, a security for value; and

to obtain an order directing issuance of notice and to obtain a restraining order;

NOW, on the proceedings heretofore had herein and on reading plaintiff's Complaint, which has been duly filed in this proceeding, and from which it appears that the value of the plaintiff's interest in the M/V KAREN MICHELLE, including pending freight, immediately after the injuries, accidents and casualties described therein did not exceed the sum of Four Hundred and Fifty Thousand Dollars ($450,000.00);

AND, on reading and filing the security for value by plaintiff and by American Home Assurance Company, as surety, in the sum of $450,000.00 with interest at six percent (6%) per annum, undertaking to pay into Court, upon entry of an order herein, the appraised value of the plaintiff's interest in the M/V KAREN MICHELLE and in the pending freight, if any, the amount so fixed, or within said time to file in this Court a stipulation for value in the usual form and with proper surety in said amount, and that, pending such payment into Court or giving of a stipulation, said security for value shall stand as security in said proceeding;

IT IS HEREBY ORDERED that the security for value be, and hereby is, approved; and it is

FURTHER ORDERED that the execution and filing of the security for value shall be without prejudice to the due appraisal of the plaintiff's said interest under order of this Court, and that, on the filing of the report to appraise and upon the determination by the Court of any exceptions thereto any party may have leave to apply to

have the amount of the same security for value increased or diminished as the Court may direct; and it is

FURTHER ORDERED that a notice issue out of and under the seal of this Court against all persons claiming damages for any and all losses, damages, expenses or injuries arising out of or occurring by reason of alleged injuries, accidents or casualties which allegedly occurred during the incident involving the M/V KAREN MICHELLE at or near Mile 171.9 of the Upper Mississippi River, as more fully described in said Complaint, citing them to appear before this Court and to file their claims with the Clerk of this Court in writing and under oath and to serve copies thereof on Lewis, Rice & Fingersh, L.C. and James V. O'Brien, and Christopher C. Swenson, attorneys for plaintiff, on or before June 12, 1998, and directing that any such persons, or their personal representatives, claiming damages as aforesaid who shall desire to contest the right of plaintiff to exoneration from or the right to limitation of liability shall answer said Complaint and serve copies thereof on plaintiff's attorneys above named; and it is

FURTHER ORDERED that public notice shall be given by publication thereof in the St. Louis Post-Dispatch, as provided by Rule F(4) of the Supplemental Rules for Certain Admiralty and Maritime Claims of the United States Supreme Court and that the plaintiff, not later than the day of second publication shall mail also a copy of said public notice to every person known to have made any claims against the M/V KAREN MICHELLE or against plaintiff arising out of the aforesaid alleged injuries, accidents or casualties during the same incident

involving the M/V KAREN MICHELLE as more fully described in plaintiff's Complaint; and it is

FURTHER ORDERED that the institution and prosecution of any suits, actions or legal proceedings of any nature or description whatsoever in any court whereosoever, except in this proceeding for the exoneration from or limitation of liability, against the plaintiff or against the property of plaintiff, including the M/V KAREN MICHELLE, in respect of any claim arising out of or connected with any alleged injuries, accidents or casualties which occurred during the incident involving the M/V KAREN MICHELLE at or near Mile 171.9 of the Upper Mississippi River, on or about March 17, 1998, are hereby stayed and restrained until the hearing and determination of this proceeding; and it is

FURTHER ORDERED that service of this Order as a restraining order within this district be made in the usual manner and in any other district of the United States by delivery by the Marshal of the United States for such district, of a certified copy of this order to the person or persons to be restrained, or to their respective attorneys or representatives.

/s/ (illegible)
United States District Judge

May 8, 1998
Date

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	No. 4:98CV00503 MLM In Admiralty
v.	)	
JAMES FRANKLIN LEWIS, Claimant.	)	

CLAIMANT'S MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE

Now comes claimant, James Lewis, by his undersigned attorney Roy Dripps, and moves this Honorable Court for an order pursuant to Supplemental Admiralty and Maritime Claims Rule F(9), 28 U.S.C., dismissing this cause or, in the alternative, transferring this cause because venue is wrongly laid in this District. In support whereof, claimant states:

1. Rule F(9) requires that this limitation proceeding be filed in the district in which petitioner has been sued because the vessel has not been arrested or attached;

2. Petitioner was sued in the Circuit Court of Madison County, Third Judicial Circuit, Illinois (Cause No. 98-L-233) which is within the territorial limits of the Southern District of Illinois;

3. The plain language of the rule requires that this action be dismissed or, alternatively, transferred to the United States District Court for the Southern District of Illinois.

WHEREFORE, claimant James Lewis respectfully prays that this Honorable Court dismiss the above-styled cause of action or transfer to the United States District Court for the Southern District of Illinois this cause pursuant to Supplemental Admiralty and Maritime Claims Rule F(9), 28 U.S.C.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ Roy C. Dripps
Roy C. Dripps, No. 29789
Attorney for Claimant
301 Evans Avenue
P.O. Box 27
Wood River, IL 62095
618/254-1127

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	No. 4:98CV00503 MLM
	)	In Admiralty
v.	)	
JAMES FRANKLIN LEWIS,	)	
Claimant.	)	

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS OR TRANSFER

Now comes claimant, James Lewis, by his attorney Roy Dripps and files his memorandum in support of his simultaneously filed Motion to Dismiss or Transfer.

ANALYSIS

Rule F(9) governs venue in a limitation of liability action such as the cause *sub judice*. *See* Rule F(1). Rule F(9) provides:

> The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, *if the vessel has not been attached or arrested, then in any*

> *district in which the owner has been sued with respect to any such claim.* When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; *if venue is wrongly laid the court shall dismiss or, if it be in the interest* of *justice, transfer the action to any district in which it could have been brought.* If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules. Rule F(9) (emphases added).

There is no allegation in the Petition for Limitation and Exoneration that the vessel has been attached or arrested. In fact, the vessel has not been attached or arrested. (See Affidavit of Roy Dripps, attached as Exhibit 1.) The owner of the vessel has been sued in the Circuit Court Third Judicial District, Madison County, Illinois. (See Affidavit of Roy Dripps, Exhibit 1 and Madison County Complaint, Exhibit 2.) The Circuit Court of Madison County is located within the territorial jurisdiction of the United States District Court for the Southern District of Illinois. (See Rule 16, Local Rules of the United States District Court for the Southern District of Illinois.)

In this circumstance, the only permissible venue for this action is the Southern District of Illinois. *In the Matter of TLC Marine Services, Inc.* (E.D.Tex.1995), 900 F.Supp.54, 55; *In the Matter of American River Transportation Co.*

(E.D.La.1994), 864 F.Supp. 554, 556. The *TLC Marine* court noted, "Supplemental Rule F(9) facially ***required*** T.L.C. [to] file its limitation petition in this district because plaintiff had sued T.L.C. in Texas state court in this district . . . . " 900 F.Supp. 54, 55 (emphasis added).

The only contrary authority claimant's research has disclosed is an officially unpublished district court case, *In the Matter of the Complaint of AWI Drilling & Workover, Inc.* (E. D. La.1991), Civil No. 91-0708 (Order of April 24, 1991), 1991 A.M.C. 2334. Without meaningful analysis or citation to authority, the rationale of that case is not persuasive. That case was explicitly rejected in *American River Transportation Co.*, 864 F.Supp 554, 555. Thus, this case is controlled by the holdings in *American River Transportation Co.* and *TLC Marine*, 900 F. Supp. 54.

Supplemental Rule F(9) thus requires that venue in this cause is proper only in the Southern District of Illinois. The statute further provides that "if venue is wrongly laid the ***court shall dismiss*** or, if it be in the interest of justice, transfer the action to any district in which it could have been brought." Supplemental Rule F(9). This Court does not have discretion both to refuse to dismiss and refuse to transfer; it must do one or the other.

Although this Court has discretion to transfer the case, the plain terms of the rule require dismissal of this cause because it was filed in the wrong venue. This would work no prejudice to petitioner because the six month time bar has not elapsed. Thus, petitioner can cure its defective filing by re-filing in the Southern District of Illinois.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

By: /s/ Roy C. Dripps
Roy C. Dripps, No. 29789
Attorney for Claimant
301 Evans Avenue
P.O. Box 27
Wood River, IL
62095-0027
618/254-1127

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	No. 4:98CV00503 MLM In Admiralty
v.	)	
JAMES FRANKLIN LEWIS,	)	
Claimant.	)	

AFFIDAVIT OF ROY C. DRIPPS

Now comes Roy C. Dripps, an adult person and attorney for claimant James Lewis, and being first duly sworn on his oath, deposes and states of his own personal knowledge:

1. I represent James Lewis in connection with a maritime personal injury which he sustained while employed by petitioner Lewis and Clark Marine, Inc. and I have personal knowledge of the facts set forth in this affidavit;

2. The Motor Vessel *Karen Michelle* has not been attached nor arrested in connection with James Lewis' injuries;

3. Lewis and Clark Marine, Inc., the petitioner herein and owner of the M/V *Karen Michelle* has been sued under the Jones Act and General Maritime Law by James Lewis in connection with his maritime personal injury in the Circuit Court of Madison County, Illinois, now pending as James Lewis, plaintiff, vs. Lewis and Clark Marine, Inc., defendant, Madison County No. 98-L-233;

4. Attached hereto as Exhibit 2 is a true and correct copy of the complaint in that cause. FURTHER AFFIANT SAYETH NOT.

/s/ Roy C. Dripps
Affiant, Roy C. Dripps

Subscribed and sworn to before me, a Notary Public, this 15th day of May, 1998.

/s/ Stefanie L. Brown
Notary Public

My Commission Expires: 3/20/99

[SEAL]

IN CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

JAMES FRANKLIN LEWIS, Plaintiff,	)	
v.	)	No.: 98L223
LEWIS & CLARK MARINE, INC. Defendant.	)	

COMPLAINT

COUNT I

(Filed Apr. 02, 1993)

(Jones Act)

Now comes the plaintiff, FRANKLIN LEWIS, by his undersigned attorneys, and for his cause of action against the defendant, LEWIS & CLARK MARINE, INC., states as follows:

1. On or about March 17, 1998, plaintiff was employed by defendant as a Deckhand and member of the crew of the M/V KAREN MICHELLE which was owned, operated and/or controlled by said defendant while the same was afloat on the Upper Mississippi River.

2. At all times herein mentioned, the defendant was a lawfully organized corporation and now is in the business of owning and operating towboats and barges upon the inland waterways of the United States, including the Upper Mississippi River and was and is doing business in the County of Madison, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of 46 U.S.C., Section 688 et seq., commonly called the Jones Act which placed on defendant the duties, among others, to use ordinary care to: provide plaintiff with a safe place to work, supervise plaintiff's work, provide plaintiff with adequate assistance and equipment with which to perform his duties, and provide proper and adequate training to the plaintiff in order to perform his duties safely.

4. At the aforementioned time and place, the plaintiff, while in the performance of his duties was severely when he was pulling a wire which had been fouled and struck his back on a cavel.

5. The defendant at said time and place, by and through its agents, servants and employees was negligent and breached its statutory duties in one or more of the following respects:

a) breached its duty to provide plaintiff with a safe place to work in that the wire plaintiff was required to work with was fouled;

b) failed to provide plaintiff with adequate assistance with which to perform his duties safely;

c) failed to provide plaintiff with appropriate supervision in the performance of his job duties;

d) failed to provide plaintiff with proper equipment with which to perform his job duties;

e) failed to provide the plaintiff with proper training in connection with the duties plaintiff was required to perform.

6. As a direct and proximate result, in whole or in part of acts of negligence and/or omissions of defendant, plaintiff was injured in one or more of the following respects:

(a) he was made sick, sore, lame and disordered and suffered extensive injuries to his neck and lower back;

(b) he has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) he has suffered a loss of earning capacity;

(d) he has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) he has become obligated for sums of money for necessary medical care, treatment and services in the past and will be required to

expend money for necessary medical care, treatment and services in the future;

(f) he has had disability in the past and will continue to have disability in the future;

WHEREFORE, plaintiff, JAMES FRANKLIN LEWIS, prays for judgment in his favor and against the defendant, LEWIS & CLARK MARINE, INC., a corporation, for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00), together with costs of suit, prejudgment interests and such other and further relief as the Court may deem just and proper.

COUNT II

(Unseaworthiness)

Now comes the plaintiff, JAMES FRANKLIN LEWIS, by his undersigned attorneys, and for his cause of action against the defendant, LEWIS & CLARK MARINE, INC., states as follows:

1. On or about March 17, 1998, plaintiff was employed by defendant as a Deckhand and member of the crew of the M/V KAREN MICHELLE which was owned, operated and/or controlled by defendant while the same was afloat on the Upper Mississippi River.

2. At all times herein mentioned, the defendant was a lawfully organized corporation which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and operating towboats and barges upon the inland waterways of the United States, including the Upper Mississippi River and was and is doing business in the County of Madison, State of Illinois.

3. The plaintiff, as a seaman, brings suit against the defendant under the provisions of the General Maritime Law of the United States, so much of which is pertinent hereto which imposes on the defendant the duty to warrant that the vessel, barges, crew, equipment and appurtenances are seaworthy in all respects.

4. The aforementioned time and place, the plaintiff, while in the performance of his duties was severely injured when he was caused to fall when pulling wire and struck back on point of cavel.

5. The defendant breached its warranty of seaworthiness and its vessel, barges and/or appurtenances were at that time unseaworthy and not reasonably fit for their intended purpose in that:

a) the wire plaintiff was working with was fouled and unfit;

b) the vessel crew as insufficient for the task assigned.

6. As a direct and proximate result, in whole or in part of the unseaworthiness of the defendant's vessel and/or crew, and/or vessel equipment, and/or appurtenances, plaintiff was injured in one or more of the following respects:

(a) he was made sick, sore, lame and disordered and suffered extensive injuries to his neck and lower back;

(b) he has lost money from loss of wages in the past and is reasonably certain to lose wages in the future;

(c) he has suffered a loss of earning capacity;

(d) he has had pain and suffering in the past and is reasonably certain to experience pain and suffering in the future;

(e) he has become obligated for large sums of money for necessary medical care, treatment and services in the past and will be required to expend money for necessary medical care, treatment and services in the future;

(f) he has had disability in the past and is reasonably certain to experience disability in the future;

WHEREFORE, plaintiff, JAMES FRANKLIN LEWIS, prays for judgment in his favor and against the defendant, LEWIS & CLARK MARINE, INC., for an amount in excess of FIFTY THOUSAND DOLLARS ($50,000.00), together with costs of suit, prejudgment interest and such other and further relief as the Court may deem just and proper.

COUNT III

(Maintenance & Cure)

Now comes the plaintiff, JAMES FRANKLIN LEWIS, by his undersigned attorneys, and for his cause of action against the defendant, LEWIS & CLARK MARINE, INC., states as follows:

1. That on or about March 17, 1998, plaintiff was employed by defendant as a Deckhand and member of the crew of the M/V KAREN MICHELLE which was owned, operated and/or controlled by defendant while the same was afloat on the Upper Mississippi River.

2. That at all times herein mentioned, the defendant was a corporation organized and existing by virtue of law, which then or thereafter assumed all liabilities of plaintiff's employment, and now is in the business of owning and operating towboats and barges upon the inland waterways of the Untied Sates, including the Upper Mississippi River, and was and is doing business in the County of Madison, State of Illinois.

3. That the plaintiff, as a seaman, brings suit against the defendant under the General Maritime Law of the United States, so much of which is pertinent hereto.

4. That at the aforementioned time and place, the plaintiff while in the performance of his duties, was injured when he was caused to fall when pulling wire and struck back on point of cavel.

5. That at all times herein mentioned, the M/V KAREN MICHELLE was in the possession and/or control of the defendant.

6. That as a result of said injuries the plaintiff has incurred extensive medical expense of treatment and other services.

7. That the plaintiff has not yet reached a point of maximum cure, and further medical expenses will be incurred in the future.

8. That the defendant has refused to meet its duty under General Maritime Law to provide its employee, the plaintiff, with full and adequate maintenance and cure for said injuries.

9. The defendant's refusal is in contravention of plaintiff's established maritime rights.

WHEREFORE, plaintiff, JAMES FRANKLIN LEWIS, by his attorneys, THE LAKIN LAW FIRM, P.C. prays for judgment in his favor and against the defendant, LEWIS & CLARK MARINE, INC., in an amount of not less then $40.00 per day, and to pay all reasonable medical expenses incurred in the diagnosis and treatment of his injuries, together with legal interest thereon from the judicial demand until paid, and for all costs of these proceedings, attorney fees and all general and equitable relief as the court deems just and proper.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ L. Thomas Lakin
L. THOMAS LAKIN
ROY C. DRIPPS
Attorneys for Plaintiff
301 Evans Avenue
P.O. Box 27
Wood River, IL
62095-0027
(618) 254-1127

IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS

JAMES FRANKLIN LEWIS, Plaintiff,	)	
v.	)	No. 98L223
LEWIS & CLARK MARINE, INC. Defendant.	)	

AFFIDAVIT

(Filed Apr. 02, 1998)

Now comes the Affiant, JAMES FRANKLIN LEWIS, after being duly sworn upon his/her oath, and states the following:

1. That the Affiant is the Plaintiff in this cause of action.

2. That the amount of damages sought in this cause of action is in excess of $50,000.

Further Affiant sayeth not.

/s/ James F. Lewis

Subscribed and sworn to before me, a Notary Public, this 2nd day of April, 19998.

/s/ Stephanie L. Brown
NOTARY PUBLIC

My Commission Expires: 3/20/99

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability v. JAMES FRANKLIN LEWIS, Claimant.	)	No. 4:98CV00503 MLM In Admiralty

PROPOSED ORDER

Claimant's motion to dismiss or, alternatively, to transfer this cause to the United States District Court for the Southern District of Illinois is GRANTED on the ground that venue is improper in this District. Supplemental Admiralty and Maritime Rule F(9). Accordingly, it is hereby ordered that this cause is DISMISSED/transferred to the United States District Court for the Southern District of Illinois.

SO ORDERED.

_____

Catherine Perry, District Judge

_____

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	Cause No. 4:98CV503 MLM In Admiralty

PLAINTIFF LEWIS & CLARK MARINE, INC.'S MEMORANDUM IN OPPOSITION TO CLAIMANT'S MOTION TO DISMISS

I. INTRODUCTION.

The attorney for Claimant James Franklin Lewis ("Claimant") is wrong on the facts and wrong on the law. Contrary to Claimant's brief, the limitation Complaint referred to herein was filed well before the state court Jones Act case. Further, the appropriate Rule F(9) venue language mandates venue in the Eastern District.

At approximately 2:00 p.m. on March 24, 1998, Plaintiff Lewis & Clark Marine, Inc. ("Lewis & Clark") filed its Complaint for Exoneration from or Limitation of Liability in the United States District Court, Eastern District of Missouri at St. Louis, as owner or owner pro hac vice of the M/V KAREN MICHELLE (Affidavit of Thomas C. Wayne, ¶ 1). The Complaint was filed as a result of an incident, which purportedly occurred on or about March 17, 1998. During the afternoon of March 24, 1998, while the Complaint was being filed, the M/V KAREN

MICHELLE was engaged in fleeting operations solely at Notre Dame No. 1 Fleet at Mile 171.6, Upper Missouri River, right descending bank, Missouri shore, west of the navigable channel. (Affidavit of Thomas C. Wayne, ¶ 2). Plaintiff requests that this Court take judicial notice that said location is within the confines of the Eastern District of Missouri Court.

On or about April 2, 1998, James Franklin Lewis filed a lawsuit against Lewis & Clark in Madison County, Illinois, No. 98-L-233. (Affidavit of Thomas C. Wayne, ¶ 3). See also Claimant's Exhibit 2. On or about May 15, 1998, Claimant filed his Motion to Dismiss or Transfer for Improper Venue ("Motion") and his Memorandum in Support of Motion to Dismiss or Transfer ("Memorandum"). On May 22, 1998, Lewis & Clark filed a Motion for Continuance with this Court allowing them additional time to respond to Claimant's Motion, up to and including May 29, 1998. Lewis & Clark's Motion for Continuance was granted on May 26, 1998.

In his Motion and Memorandum, Claimant argues that "venue is wrongly laid in this District." Claimant has relied upon incorrect facts and the wrong statutory provision of Supplemental Rule F(9) in concluding that venue is improper in the instant case. Based upon the undisputed facts attested to by Thomas C. Wayne in his affidavit, attached hereto as Exhibit A and incorporated herein by reference, Lewis & Clark has complied with Supplemental Rule F(9) governing Limitation of Liability and filed the instant action in the proper venue – the United States District Court, Eastern District of Missouri. Therefore, Claimant's Motion must be denied.

II. ARGUMENT.

The proper venue for limitation of liability actions is governed by Rule F(9) of the Supplemental Rules of Civil Procedure. This Rule, in part, provides:

> If the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. **When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be,** but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district.

Rule F(9) of the Supplemental Rules of Civil Procedure (emphasis added).

Claimant's Motion is inappropriate because Lewis & Clark's Complaint was filed with this Court before Claimant's state law Complaint was filed in Madison County, Illinois. Lewis & Clark's Complaint was filed on March 24, 1998 and is attached hereto as Exhibit B and incorporated herein by reference. (Affidavit of Thomas C. Wayne, ¶ 1). Claimant's Complaint was filed on April 2, 1998. Consequently, it is undisputed that no suit had been commenced against Lewis & Clark before Lewis & Clark filed its Complaint in this case. It is also undisputed that the M/V KAREN MICHELLE was within this District at the time the Complaint was filed Lastly, the M/V KAREN MICHELLE had not been attached or arrested prior to Lewis & Clark filing its Complaint. (Affidavit of Thomas C. Wayne, ¶ 4). *See also* Claimant's Exhibit 1. Therefore,

the plain language of the Rule required Lewis & Clark to file this action in the United States District Court for the Eastern District of Missouri and it properly did.

Claimant's argument, legal authority, and analysis are wrong because they erroneously assume that Claimant's lawsuit was pending when Lewis & Clark's Complaint was filed. Additionally, both cases cited in support of his Motion involve limitation complaints filed after a Jones Act lawsuit being filed. This is not the situation in this case and Claimant's assumption was incorrect. Therefore, based upon a plain reading of the law and undisputed facts, venue properly lies in the United States District Court, Eastern District of Missouri, Eastern Division. *See Morrison v. District Court for Southern District of New York. N.Y.*, 147 U.S. 14 (1893)(The vessel "not having been liable to answer for the loss resulting from the collision, and no suit therefore having been commenced against her owner, the proceedings were instituted lawfully in the District Court in Massachusetts, that being the district in which the vessel was at the time the proceedings were instituted . . . . ").

III. CONCLUSION.

It is undisputed that the M/V KAREN MICHELLE was not attached or arrested to answer the matters aforesaid. It is undisputed that Claimant had not filed suit against Lewis & Clark prior to its filing its Complaint. It is undisputed that the M/V KAREN MICHELLE was within the Court's District at all relevant times herein. Therefore, pursuant to Supplemental Rule F(9),

the United States District Court, Eastern District of Missouri at St. Louis, is the proper venue for this proceeding and Claimant's Motion to Dismiss or Transfer for Improper Venue must be denied.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

By /s/ James V. O'Brien
James V. O'Brien, #3973
Christopher C. Swenson, #74100

500 North Broadway, Suite 2000
St. Louis, MO 63102
(314) 444-7600
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Attorneys for Defendant
Lewis & Clark Marine, Inc.

TAB A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)))))))	Cause No. 4:98CV503 MLM In Admiralty

AFFIDAVIT OF THOMAS C. WAYNE

The undersigned, Thomas C. Wayne, after being duly sworn, does depose and state that:

1. I am Personnel and Administration for Lewis & Clark Marine, Inc. ("Lewis & Clark"). My job duties include maintaining records involving the location of the vessels owned and operated by Lewis & Clark. Lewis & Clark filed its Complaint for Exoneration from or Limitation of Liability as Owner or Owner Pro Hac Vice of the M/V KAREN MICHELLE at approximately 2:00 p.m. on March 24, 1998, in the United State [sic] District Court for the Eastern District of Missouri at St. Louis, Missouri.

2. During the afternoon of March 24, 1998, at the time the Complaint herein was filed, the M/V KAREN MICHELLE was engaged in fleeting operations solely at Notre Dame No. 1 Fleet at Mile 171.6, Upper Missouri River, right descending bank (Missouri shore), west of the navigable channel, at all relevant times herein. The vessel was within this District at the time the case was filed.

3. Upon information and belief, Claimant James Franklin Lewis filed a lawsuit against Lewis & Clark as owner of the M/V KAREN MICHELLE captioned *James Franklin Lewis v. Lewis & Clark Marine, Inc.*, No. 98-L-233, on or about April 2, 1998.

4. Upon information and belief, the M/V KAREN MICHELLE has not been attached or arrested to answer matters regarding this lawsuit.

FURTHER AFFIANT SAYETH NOT.

/s/ Thomas C. Wayne
THOMAS C. WAYNE

STATE OF MISSOURI)
) ss:
CITY OF ST. LOUIS)

Subscribed and sworn to before me this 29th day of May, 1998.

/s/ Kimberly L. Peter
Notary Public

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	Cause No. _____ In Admiralty 4:98CV00503MLM

(Filed Mar. 24, 1998)

COMPLAINT FOR EXONERATION FROM OR LIMITATION OF LIABILITY

COMES NOW plaintiff, Lewis & Clark Marine, Inc. ("Lewis & Clark"), as owner or owner *pro hac vice* of the M/V KAREN MICHELLE, and for its Complaint for Exoneration from or Limitation of Liability, pursuant to 46 U.S.C. § 181 *et seq.*, states:

1. This action arises under the laws of the United Sates providing for limitation of a vessel owner's liability (46 U.S.C. §§ 181-195 inclusive) and the various statutes, rules and regulations relating thereto. This is an admiralty and maritime claim within the meaning of Rule 9(h), Fed.R.Civ.P. and for the purposes of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims.

2. At all times relevant hereto, plaintiff Lewis & Clark was and is a Missouri corporation organized and existing under and by virtue of law with its principal place of business in Granite City, Illinois, and was at all

times relevant hereto the owner or owner *pro hac vice* of the M/V KAREN MICHELLE.

3. At all times relevant to the subject matter of the exoneration or limitation sought, the M/V KAREN MICHELLE was based out of the Louisiana Dock at St. Louis Harbor and was on a one day voyage during which it was making a northbound tow in connection with the M/V WENDY L. James Lewis boarded the M/V KAREN MICHELLE at 6:00 a.m. on March 17, 1998 at the Louisiana Dock, St. Louis Harbor.

4. At all material times, the M/V KAREN MICHELLE was a 1350 h.p. twin screw river towboat used on the navigable waters of the United States, and which at all times mentioned herein was tight, staunch, strong and seaworthy in all respects.

5. Prior to the time of the injury herein described, plaintiff used due diligence to ensure that the M/V KAREN MICHELLE was in fact, tight, staunch, strong, and in all respects seaworthy and fit for the use in which it was engaged.

6. On or about March 17, 1998, James Lewis was working as a deckhand aboard the M/V KAREN MICHELLE at or near Mile 171.9 of the Upper Mississippi River during the course of the aforesaid voyage. In the course of work, James Lewis was injured when he purportedly tripped over a wire and injured his back. James Lewis ended his tour March 17, 1998, at or about 9:15 a.m. when he was returned to the Louisiana Dock by Pilot Rich Garner. James Lewis was taken to Midwest Occupational Medicine to be examined and treated.

7. At the time of the alleged injury aforesaid, the value of the M/V KAREN MICHELLE did not exceed the sum of Four Hundred and Fifty Thousand Dollars ($450,000.00), and the plaintiff annexes hereto and makes a part hereof an affidavit as to the value of the M/V KAREN MICHELLE immediately after the incident. Upon information and belief, there was no "pending freight" within the intended meaning of 46 U.S.C. § 183. Upon information and belief, plaintiff states that there are no liens upon the M/V KAREN MICHELLE prior to or paramount to any liens which may have accrued by reason of the matters described in this Complaint.

8. The losses and damages allegedly resulting from the matters aforesaid were not caused or contributed to by any fault or neglect on the part of the plaintiff, nor of anyone for whose act plaintiff is or may be responsible, or on the part of the M/V KAREN MICHELLE.

9. The alleged losses and damages above referred to were done, occasioned and incurred without any fault on the part of the plaintiff and without plaintiff's privity or knowledge. Plaintiff denies any liability for any claim of loss or damage occasioned by or resulting from the matters and happenings above recited and avers that plaintiff has a valid defense to all such claims. Plaintiff desires to contest plaintiff's liability for all such claims, and, therefore, show that plaintiff is entitled to exoneration from any liability. Should this Honorable Court, however, adjudge that plaintiff is in any way liable to any extent in the premises, then plaintiff claims the benefit of limitation of liability provided for in 46 U.S.C. §§ 181-195. Subject to an appraisal of plaintiff's interest in the M/V KAREN MICHELLE on a reference, should one be

ordered, plaintiff offers and will file an *ad interim* stipulation, with approved corporate surety, for the payment into Court, whenever the Court shall so order, of the aggregate amount of plaintiff's interest in the M/V KAREN MICHELLE, and pending freight, if any, with interest at the rate of six percent (6 %) per annum from the date of the security.

WHEREFORE, plaintiff prays:

A. That this Honorable Court enter an order approving the Stipulation for Costs in the amount of Two Hundred and Fifty Dollars ($250.00);

B. That the Honorable Court enter an order approving the Security for Value fled by plaintiff in the amount of Four Hundred and Fifty Thousand Dollars ($450,000.00) with six percent (6 %) per annum interest from the date of such stipulation, pending the appraisement of the Court of the amount of plaintiff's interest in the M/V KAREN MICHELLE and its pending freight, if any, as to quantum, form and surety;

C. That upon the filing of the foregoing, this Court issue an injunction restraining the commencement or prosecution of any and all actions, suits or legal proceedings of any kind against plaintiff, the M/V KAREN MICHELLE or its underwriters or any other property owned by plaintiff arising out of the matters and happenings recited in the above and foregoing Complaint other than in these proceedings.

D. That the Court cause a notice to be issued to all persons, firms and corporations having or alleging to have claims by reason of the matters and happenings recited in the above

and foregoing Complaint, admonishing them to appear and file their claims with the Clerk of this Honorable Court on or before the date to be fixed by this Court and as specified in the notice or be forever barred and permanently enjoined from making and filing any such claims; and to answer, all and singular, the premises of this Complaint;

E. That the Court adjudge the plaintiff, the M/V KAREN MICHELLE, not liable for any damages, demands or claims whatsoever in consequence of or arising out of or connected with the matters and happenings recited in the above and foregoing Complaint.

F. That, in the alternative, if this Court should adjudge the plaintiff is liable to any extent in the premises, the Court then adjudge that the liability of the plaintiff be limited to the amount of its interest in the M/V KAREN MICHELLE, plus pending freight, if any, at the time of the alleged injury aforesaid; and in that event, the amount paid into the Court as representing the value of the plaintiff's interest in the M/V KAREN MICHELLE, and then pending freight, if any, shall be divided pro rata among any claimants having made due proof of their represented claims; and that a decree be entered discharging plaintiff, the M/V KAREN MICHELLE from any liability in consequence of or arising out of or connected with the matters and happenings recited in the above and foregoing complaint;

G. That plaintiff may have such other and further relief in the premises as may be just and proper and this Court competent to grant.

LEWIS, RICE & FINGERSH, L.C.

By /s/ Christopher C. Swenson
James V. O'Brien #3973
Christopher C.
Swenson, #74100

500 North Broadway,
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Attorneys for Plaintiff Lewis & Clark Marine, Inc.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner of THE M/V KAREN MICHELLE for Exoneration from or Limited Liability	)	Cause No. _____ In Admiralty

AFFIDAVIT OF VALUE

STATE OF MISSOURI CITY OF ST. LOUIS	)	SS.

I, PETER C. MERRILL, being duly sworn, depose that I am an independent marine surveyor and am President of Merrill Marine Services, Inc., and I am familiar with and know the value of the M/V KAREN MICHELLE, and state that on or about March 17, 1998, the value of the M/V KAREN MICHELLE was *Four Hundred Fifty Thousand Dollars* ($450,000.00), to the best of my knowledge, information and belief.

/s/ Peter C. Merrill
Peter C. Merrill

Subscribed and sworn to before me this 24th day of March, 1998.

/s/ Peggy [Illegible]
Notary Public

My commission expires: March 5, 1999.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability v. JAMES FRANKLIN LEWIS, Claimant.	)	No. 4:98CV00503 MLM In Admiralty

NOTICE OF VOLUNTARY DISMISSAL

Please take notice that claimant, James Franklin Lewis, by his undersigned attorneys, voluntarily dismisses his Motion to Dismiss or Transfer for Improper Venue filed with this Court on May 15, 1998, in the above-styled matter.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ Roy C. Dripps
Roy C. Dripps, No. #3014
Attorney for Claimant
301 Evans Avenue
P.O. Box 27
Wood River, IL 62095
618/254-1127

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability,	)	No. 4:98cv00502 MLM
Petitioner,	)	
vs.	)	
JAMES FRANKLIN LEWIS	)	
Claimant/Respondent.	)	

ANSWER TO COMPLAINT FOR EXONERATION FROM OR LIMITATION OF LIABILITY

COMES NOW James Franklin Lewis, claimant by and through his undersigned answer to the complaint for exoneration from or limitation of liability states as follows:

1. Claimant denies each and every material allegation in the petitioner's complaint under which petitioner claims it is entitled to exoneration from or limitation of liability.

2. Claimant further states that petitioner is not entitled to exoneration from or limitation of liability for the reason that the petitioner had privity and knowledge of the negligence and carelessness of the petitioner which caused the injuries to claimant, James Franklin Lewis.

3. Claimant further states that petitioner is not entitled to exoneration from or limitation of liability for the reason that it had privity and knowledge of the unseaworthiness of the M/V KAREN MICHELLE which caused the injuries of claimant, James Franklin Lewis.

4. That the injury to James Franklin Lewis was caused directly by the aforementioned negligence or fault of the petitioner or the unseaworthiness of the aforementioned vessel, all of which was in the privity and knowledge of the petitioner.

WHEREFORE, claimant prays that the Complaint for Exoneration From Or Limitation Of Liability be denied.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ Roy C. Dripps
ROY C. DRIPPS #3014
Attorney for Claimant/
Respondent
301 Evans Avenues
P.O. Box 27
Wood River, IL 62095-0027
(618) 254-1127

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability,	)	No. 4:98cv00502 MLM
Petitioner,	)	
v.	)	
JAMES FRANKLIN LEWIS	)	
Claimant/Respondent.	)	

CLAIM OF DAMAGES FOR INJURY

COUNTY OF MADISON)
STATE OF ILLINOIS)

JAMES FRANKLIN LEWIS, being duly sworn, states as follows: I have filed a motion to dismiss or transfer for improper venue and I expressly do not waive venue by filing this claim. I file this claim to comply with the deadline of June 12, 1998 set by this Court for the filing of claims.

I am a resident of Madison County, State of Illinois. On or about March 17, 1998 , I was employed by LEWIS & CLARK MARINE, INC. as a deckhand and crew member of M/V KAREN MICHELLE, at the time at which I was injured.

As I am informed and believe, I was injured through the fault of this said petitioner, LEWIS & CLARK MARINE, INC. and the unseaworthiness of the M/V KAREN MICHELLE without fault on my part and sustained severe and permanent injuries to my neck and lower back.

I am entitled to maintain an action to recover damages for the injuries sustained and hereby claim an amount in excess of the value of $450,000.00 stated in petitioner's stipulation for value of its interest in the M/V KAREN MICHELLE, no part of which has been paid.

/s/ James Franklin Lewis
JAMES FRANKLIN LEWIS

Subscribed and sworn to before me, a Notary Public, this 5th day of June, 1998.

/s/ Stefanie L. Brown
NOTARY PUBLIC

My Commission Expires: 3/20/99

"OFFICIAL SEAL"
STEFANIE L. BROWN
Notary Public – State Of Illinois
My Commission Expires: 3/20/99

page two of Claim of James Franklin Lewis

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLAIM MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability,	)	No. 4:98CV00502 MLM
Petitioner,	)	
vs.	)	
JAMES FRANKLIN LEWIS,	)	
Claimant/Respondent.	)	

MOTION TO DISSOLVE RESTRAINING ORDER

Comes now claimant, James Franklin. Lewis, and for his motion to dissolve the restraining order entered on May 11, 1998, states as follows:

1. That Lewis & Clark Marine, Inc., a Corporation, hereinafter called petitioner, filed a complaint seeking exoneration from or limitation of liability for damages arising out of an accident involving the M/V KAREN MICHELLE on March 17, 1998, and simultaneously applied for restraining order which was granted.

2. That under the terms of said restraining order issued on May 11, 1998, all claimants are restrained from filing, commencing or proceeding in any actions against petitioner or the M/V KAREN MICHELLE in relation to

the above-described incident occurring on March 17, 1998,. at or near Mile 168.6 , and that all such proceedings are stayed until the hearing and determination of this proceeding.

3. That prior to receiving notice of the filing of this petition and the issuance of the restraining order James Franklin Lewis, the claimant in this proceeding, had filed a lawsuit against petitioner alleging Jones Act negligence, unseaworthiness and maintenance and cure claims as a result of the incident occurring on March 17, 1998, in the Circuit Court of Madison County, State of Illinois, Cause No.98-L233.

4. That James Franklin. Lewis has filed an answer to said complaint denying all allegations and further stating that petitioner is not entitled to exoneration from or limitation of liability due to its privity and knowledge of the negligence and unseaworthiness which caused the injuries of claimant, James Franklin. Lewis.

5. That James Franklin. Lewis has filed a claim with this Court setting forth his claim of damages in excess of $450,000, which petitioner has submitted as the value of the vessel in question.

6. That claimant, James Franklin. Lewis, is the sole claimant who was injured on the M/V KAREN MICHELLE seeking damages as a result of the incident which is the subject of this proceeding. Therefore, he is entitled to a dissolution of the order of injunction.

7. That petitioner seeks a dissolution of the order of injunction so that he may proceed with his cause of action of negligence and unseaworthiness in the Circuit Court of

Madison County, State of Illinois. That claimant, James Franklin Lewis, is entitled to pursue his cause of action against petitioner in state court.

8. That claimant waives any claim of res judicata relevant to the issue of limited liability based on any judgement obtained in state court; and stipulates to petitioner's right to litigate issues relating to the limitation in this limitation proceeding.

WHEREFORE, claimant, James Franklin Lewis, prays this court to enter an order dissolving the injunction entered in this cause on March 24, 1998, and for such other relief as it deem proper under the circumstances.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ Roy C. Dripps
ROY C. DRIPPS #3014
Attorneys for Claimant
301 Evans Avenue
P.O. Box 27
Wood River, IL
62095-0027
(618) 254-1127

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLAIM MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability,	)	No. 4:98CV00402 MLM
Petitioner,	)	
vs.	)	
JAMES FRANKLIN LEWIS,	)	
Claimant/Respondent.	)	

MEMORANDUM IN SUPPORT OF CLAIMANT'S MOTION TO DISSOLVE RESTRAINING ORDER

Pursuant to Section 181 of the Limitation of Liability Act, 46 U.S.C., Sec. 181, a shipowner may obtain an injunction staying all other proceedings relating to a particular marine casualty. However, there are two exceptions to this rule requiring an injunction.

The first, which is inapplicable here, is when the value of the limitation fund exceeds the value of the claims filed. The second is when there is only one claimant in the action. *Langnes v. Green*, 282 U.S. 531, 1931 AMC 511 (1930); *Lake Tankers Corporation v. Henn*, 354 U.S. 147, 77 S. Ct. 1269, 1 L.Ed.2d 1246 (1957).

In single claimant cases, courts have consistently held the district court must dissolve the injunction so that the claimant may pursue a separate action with a jury trial, and a failure to do so constitutes an abuse of discretion. *In Matter of Complaint of Port Arthur Towing Co.*, 42 F.3d 312 (5th Cir. 1995), cert. denied ___ U.S. ___, 116 S.Ct. 87, 133 L.Ed.2d 44; *Gorman v. Cerasia*, 2 F.3d 519 (3rd Cir. 1993); *Jefferson Barracks Marine Serv., Inc. v. Casey*, 763 F.2d 1007 (8th Cir. 1985); *In the Matter of Yu Sheng Fishery Co., Ltd., owner of FN Yu Sheng No. 1.* 1993 AMC 116 (D.Ct. Guam 1991); *Helena Marine Service, Inc. v. Sioux City, etc.*, 564 F.2d 15 (8th Cir. 1977). This is to effectuate the intent of the "savings to suitors" clause, which provides for a Jones Act seaman to bring his case in state court and have it tried before a jury. *S & E. Shipping Corp.v. Chesapeake & O. Ry. Co.*. 678 F.2d 636 (6th Cir. 1982).

In the recent case of *Complaint of McCarthy Bros. Co./ Clark Bridge*, 83 F.3d 821 (7th Cir. 1996), the Seventh Circuit, sua sponte, raised this issue in a case where the district court had refused to lift an injunction entered in connection with a limitation of liability proceeding even though there was only one claimant and the claimant had filed a Jones Act complaint in state court and wished to pursue his rights in that forum.

The Court reversed the district court, after trial, holding that under *Langes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931) the federal district court is required to 'abstain[1] because the right to a common law remedy in

[1] Claimant disagrees that this is a true abstention situation because it does not fall within any of the recognized categories

state court before a jury guaranteed by the savings to suitor clause 28 U.S.C. § 1333(1) takes precedence over the shipowner's right to proceed with its limitation of liability action in federal court where there is only one claimant or the value exceeds the amount of the claims filed.

The only prerequisite to dissolution of the injunction is a stipulation that limitation of liability questions be reserved for the limitation of liability action. *Complaint of Midland Enterprises. Inc.*, 886 F.2d 812 (6th Cir. 1989); *In re Two R. Drilling Co., Inc.*, 943 F.2d 576 (5th Cir. 1991). Claimant has so stipulated in its Motion to Dissolve the Restraining Order.

Claimant, James Sinclair Lewis is the sole person who was injured in the incident leading to this action and is the only claimant in this proceeding. Consequently, he is entitled to proceed with his state court law suit during the pendency of this limitation proceeding.

Claimant further submits that in conjunction with lifting the injunction, the court should stay this action during the pendency of claimant's state court. In exercising his rights under the "saving to suitors" clause in 46 U.S.C. § 183, claimant has filed a suit in state court to determine the issue of liability in this case. Whether the question of limitation must await the trial of the liability

of abstention and does not involve considerations of comity, federalism or further wise judicial administration. It is more a question of whether the federal limitation of liability questions should be stayed until the claimant can file and pursue his Jones Act and accompanying maritime unseaworthiness claims in state court, which he has the right to do under the Jones Act.

issue is a matter for the District Court's discretion, to be determined by the circumstances of each case. *Valley Line Company v. Ryan*, 771 F.2d 366 (1985). It is clear that this Court, in an effort to avoid piecemeal litigation and to prevent unnecessary judicial proceedings should stay the Limitation of Liability determination until the issue of liability is determined at the state level.

This procedure is not uncommon.[2] The Court in *International* granted a stay of the federal proceedings due to the fact that the state proceedings could finally resolve the case, while preserving the possibility that further federal proceedings may be necessary to fully resolve the issues. *International Assn. of Entrepreneurs of America v. Angoff*, 58 F.3d 1266, 1271 (8th Cir.1995). This case is similar in that the need for limiting liability by the District Court may not be required if no liability is found.

Further, the Seventh Circuit follows similar procedures. In *McCarthy*, the court granted a stay of the limitation of liability issue in the Federal Court pending resolution of the state court issue of liability due to the fact that the need for further Federal proceedings may be obviated. *In the Matter of the Complaint of McCarthy Brothers Company/Clark Bridge*, 83 F.3d [illegible], 828 (7th Cir.1996).

---

[2] This District Court entered such a stay in *In The Matter of the Complaint of Luhr Bros. Inc., as owners of The M/V Sheryl and Barge L 1017 For Exoneration From, or Limitation of Liability*, Cause No. 1:96CV187 CDP. (E.D. Mo. 1997). This case was settled along with the related state court case.

CONCLUSION

Because there is but one claimant, the Court is required to dissolve the restraining order entered in this case so claimant, James Franklin Lewis may proceed with his cause of action arising from his injury on the M/V KAREN MICHELLE, in the state of Illinois. Claimant further prays this Court enter an order staying this cause of action until final disposition of *Lewis v. Lewis & Clark Marine, Inc.*, Cause No. 98-L-232, Madison County Circuit Court, Illinois.

Respectfully submitted,
THE LAKIN LAW FIRM, P.C.

BY: /s/ Roy C. Dripps
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[SEAL]

United States District Court

Eastern District of Missouri
St. Louis Division

Notice of Orders or Judgments
Fed. R. Civ. P. 77(d)

Date: 06/09/98

To: Roy C. Dripps
LAKIN LAW FIRM
301 Evans Avenue P.O. Box 27
Wood River, IL 62095

Re: Case Number: 4:98-cv-00503 Instrument Number: 15

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Number of pages including cover sheet: 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	No. 4:98CV00503 MLM
v.	)	In Admiralty
JAMES FRANKLIN LEWIS, Claimant.	)	

NOTICE OF VOLUNTARY DISMISSAL

(Filed Jun. 9, 1998)

Please take notice that claimant, James Franklin Lewis, by his undersigned attorneys, voluntarily dismisses his Motion to Dismiss or Transfer for Improper Venue filed with this Court on May 15, 1998, in the above-styled matter.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ Roy C. Dripps
Roy C. Dripps, No. #3014
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UNITED STATES DISTRICT COURT –
EASTERN MISSOURI
INTERNAL RECORD KEEPING

AN ORDER, JUDGMENT OR ENDORSEMENT WAS MAILED AND LABELS WERE CREATED FOR THE FOLLOWING INDIVIDUALS ON 06/09/98 at 14:43 by kstamm FOR CASE NUMBER: 4:98cv503

Lewis & Clark Marine vs

28:1333 Admiralty

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability	)	Cause No. 4:98CV503 MLM In Admiralty

MEMORANDUM IN OPPOSITION TO CLAIMANT'S MOTION TO DISSOLVE RESTRAINING ORDER

COMES NOW Petitioner, Lewis & Clark Marine, Inc. ("Lewis & Clark"), by and through its attorneys, and for its Memorandum in Opposition to Claimant's Motion to Dissolve Restraining Order, states as follows:

I. INTRODUCTION

On March 17, 1998, Claimant James Franklin Lewis ("Claimant") was purportedly injured while working for Lewis & Clark as a crew member aboard the M/V KAREN MICHELLE. At the time of the alleged incident, Lewis & Clark was the owner or, alternatively, the owner pro hac vice, of the M/V KAREN MICHELLE and Lewis & Clark continues to be the owner or, alternatively, the owner pro hac vice of the M/V KAREN MICHELLE. On March 24, 1998, Lewis & Clark timely filed its Complaint for Exoneration From or Limitation of Liability ("Complaint") with this Court pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq*. Thereafter, this Court

approved the surety bond in the amount of $450,000 as security for Lewis & Clark's interest in the M/V KAREN MICHELLE; directed that any person with a claim related to the alleged March 17, 1998 incident file said claim with the Court on or before June 12, 1998; and enjoined the institution or prosecution of any other suits against Lewis & Clark relating to said alleged marine casualty.

Claimant filed a Motion to Dismiss or Transfer for Improper Venue on May 15, 1998. Next, claimant voluntarily dismissed said Motion on June 5, 1998. On June 9, 1998, Claimant filed his Claim of Damages for Injury and his Answer to Complaint for Exoneration from or Limitation of Liability with this Court.

On April 3, 1998, ten (10) days after Lewis & Clark filed its Limitation Petition with this Court, Claimant filed his own Complaint in the Circuit Court of Madison County, State of Illinois (the "state court action") seeking damages for personal injuries allegedly sustained in the March 17, 1998 incident, Cause No. 98-L-233. Claimant's state court action alleges three (3) counts: (1) negligence under the Jones Act, 46 U.S.C. § 688 *et seq.*; (2) unseaworthiness; and (3) maintenance and cure. Claimant did not request a jury trial in his Illinois state court action. Claimant has thus waived his right to demand a jury trial. 735 ILCS 5/2-1105. Lewis & Clark demanded a jury trial when it filed its answer in the state court action. However, according to *Allen v. Norman Bros., Inc.*, 678 N.E.2d 317, 320-21 (5th Dist. 1997), controlling precedent in Madison County, Illinois, a defendant in a Jones Act case has no right to a jury trial. Thus, Lewis & Clark's jury demand is, at this time, of no effect, and the Illinois state court action will be tried to a judge without a jury.

On May 8, 1998, Judge Catherine Perry executed an Order staying Claimant's state court action. The Order was filed with this Court on May 11, 1998 and Lewis & Clark filed its Notice of Stay with the Circuit Court of Madison County on May 12, 1998. On June 9, 1998, Claimant filed the instant Motion to Dissolve Restraining Order ("Motion") and Memorandum in Support ("Memorandum"), which is now before the Court for disposition. Claimant is asking this Court to dissolve the stay Order entered by Judge Perry, allow the non-jury state court action to proceed, and stay this action during the pendency of the state court action.

Claimant's Motion should be denied. His argument is factually and legally erroneous. Claimant tellingly omits from his Motion and Memorandum the crucial fact that he has waived his right to a jury trial. Thus, his rights to a common law remedy have not been violated. Under prevailing law, as set forth in Judge Webber's opinion of October 16, 1997 in *Complaint of Eagle Marine Indus. Inc.*, No. 4:97CV00357 ERW, attached hereto, Claimant should not be permitted to go forward to the Circuit Court of Madison County, Illinois unless he is pursuing a jury trial. Claimant has simply not satisfied either of the two (2) exceptions to a shipowner's right to obtain a stay. The most important fact is uncontroverted – Claimant is not seeking and cannot now seek a **jury trial** in his state court action. Therefore, this Court must deny Claimant's Motion.

II. ARGUMENT

CLAIMANT HAS FAILED TO SATISFY EITHER OF THE TWO EXCEPTIONS that PREVENT A SHIPOWNER FROM OBTAINING AN INJUNCTION STAYING ALL OTHER PROCEEDINGS RELATING TO A PARTICULAR MARINE CASUALTY BECAUSE CLAIMANT HAS WAIVED HIS RIGHT TO A JURY TRIAL IN HIS CORRESPONDING STATE COURT ACTION.

Claimant correctly states in his Memorandum that there are two exceptions to the rule that a shipowner may obtain an injunction pursuant to the Limitation of Liability Act, 46 U.S. C. § 181, et seq., staying all other proceedings relating to a particular marine casualty. The exceptions are: (1) when the value of the limitation fund exceeds the total value of all claims filed; and (2) when there is a one claimant action. *Langnes v. Green*, 282 U.S. 531 (1931). These limited exceptions were created to preserve a claimant's right to a common law remedy. Otherwise, federal district courts have original jurisdiction over this maritime matter, exclusive of the courts of the states. 28 U.S.C. § 1333(1). Claimant concedes that the first exception is inapplicable to the instant case. The second exception, discussed more fully below, is equally inapplicable.

The one claimant exception only applies when a claimant seeks a jury trial in his state court action. *See Complaint of Eagle Marine Indus. Inc.*, No. 4:97CV00357 ERW (E.D.Mo. October 16, 1997). As Judge Webber stated in that case, "[s]ince the plaintiff has failed to make a jury demand in . . . her complaint . . . filed in Illinois State

Court . . . . , there is not a conflict between the shipowner's right to limitation and the claimant's right to a jury trial, and so this court should not consider dissolving the injunction." *See* Webber Order at 6.

Claimant's own Memorandum states "In single claimant cases, courts have consistently held the district court must dissolve the injunction so that the claimant may pursue **a separate action with a jury trial** . . . " (Memorandum P. 1) (emphasis added). While Claimant agrees with Judge Webber's ruling, he has failed to inform this Court that he has waived his right to a jury trial in his Illinois state court action. Since Claimant is not pursuing a separate action with a jury trial, the single claimant exception is inapplicable and this Court should not dissolve its Order staying the state court action.

The reason for allowing Claimant to pursue recovery outside of a limitation and exoneration, the claimant's right to a jury trial, has been eliminated by Claimant's waiver of a jury trial in his state court action. The Limitation of Shipowner's Liability Act (the "Act") allows district courts, under their exclusive admiralty jurisdiction conferred by 28 U.S.C. § 1333(1), to limit, under certain circumstances, a shipowner's liability for injuries or death to the value of the owner's interest in the vessel and its pending freight at the time of the incident. *Joyce v. Joyce*, 975 F.2d 379, 383 (7th Cir. 1992); 46 U.S.C. § 181 *et seq.* Under the Act, federal courts have the exclusive jurisdiction to decide whether a shipowner's liability should be limited. *Complaint of McCarthy Bros. Co./Clark Bridge*, 83 F.3d 821, 826 (7th Cir. 1996).

In exercising its exclusive jurisdiction, the district court must necessarily enjoin proceedings in state court. *Id.* This result, however, is in conflict with the "saving to suitors" clause of 28 U.S.C. § 1333(1), which excepts from the district court's exclusive jurisdiction over admiralty matters the right of suitors to seek "all other remedies to which they are entitled." *Id.* The "savings to suitors" clause allows a Jones Act seamen to bring his case in state court and have it tried before a jury. *S & E Shipping Corp. v. Chesapeake & O. Ry. Co.*, 678 F.2d 636 (6th Cir. 1982).[1] The significance of the conflict is that claimants have no right to a jury in admiralty actions and thus lose their right to pursue common-law remedies before a jury when forced into admiralty court under the Act.

As a result of this conflict between the district court's exclusive admiralty jurisdiction and the claimant's right to a jury trial, the federal courts have allowed claimants to pursue state court actions according to the two exceptions discussed above. When these exceptions apply, the federal court abstains until the state court action has concluded. *McCarthy Bros.*, 53 F.3d at 827-28. When a

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[1] Petitioner does not dispute that the "savings to suitors" clause, 28 U.S.C. § 1333(1) guarantees a common law remedy in state court **before a jury** and that, according to the prevailing case law, this guarantee takes precedence over the shipowner's right to proceed with its limitation and exoneration in federal court where there is only one claimant or the value exceeds that amount of the claims filed. Petitioner fails to comprehend how the guarantee applies in the instant case considering Claimant has not requested a jury trial in his state court action. Furthermore, Claimant's stipulation regarding Lewis & Clark's right to litigate issues pertaining to the limitation has no bearing on the Court's Order staying the state court action.

claimant does not seek a jury in his state court action, however, there is no conflict between the shipowner's right to limitation and the claimant's right to a jury trial. This is the situation in the instant case. Consequently, there is no reason to allow the claimant to proceed outside the limitation and exoneration action. *See Complaint of Eagle Marine Indus.*, No. 4:97CV00357 ERW (E.D.Mo. October 16, 1997) (Webber, J.) (order denying claimant's motion to dissolve restraining order) (citing *Valley Line Co. v. Ryan*, 771 F.2d 366, 372 (8th Cir. 1985) and *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979)); *see also Ex Parte Green*, 286 U.S. 437, 440 (1932); *Complaint of S&E Shipping Corp.*, 1982 A.M.C. 2940, 2943 (N.D. Ohio).

In *Eagle Marine*, petitioners filed a complaint for exoneration from or limitation of liability. Claimant filed a claim with the district court and, at some point, filed an action in Illinois State court. The district court entered an order enjoining the filing or commencement of any actions against petitioner related to the incident that was the subject of the complaint. Claimant thereafter moved to dissolve the restraining order. In denying claimant's motion, the district court noted that claimant did not make a jury demand in both her complaint and amended complaint filed in Illinois state court. The court explained that "[s]ince [claimant] has not requested a jury trial, there is not a conflict between the shipowner's right to limitation and the claimant's right to a jury trial, and so this Court should not consider dissolving the injunction." *See* Webber Order at 6. The district court correctly chose to retain its exclusive jurisdiction.

In *Complaint of S&E Shipping Corp.*, a similar action to dissolve an injunction staying a state court proceeding,

the motion to dissolve was denied because no jury demand was made in the state court proceeding. 1982 A.M.C. at 2943. The court found that without such a demand, having the entire matter determined by the admiralty court did not result in any denial of the claimant's common law remedy and thus did not interfere with the "savings to suitors" clause. *Id.* Having the federal court resolve the entire claim was also consistent with the purpose of the Limitation Act: "In the absence of such a [jury] claim, the congressional policy to have the matter determined in a single forum is clear." *Id.* The district court properly chose to retain its exclusive jurisdiction.

In the case at bar, Claimant has waived his right to a jury trial in his state court action and Lewis & Clark is not entitled to one.[2] This obviates the conflict between the "savings to suitors" clause and the Act, allowing this Court to retain its exclusive jurisdiction and the authority to stay the state court action.

III. CONCLUSION

Because Claimant waived his right to jury trial in his Illinois state court action, there is no conflict between

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[2] Claimant is no longer entitled to demand a jury trial in the Illinois state court action. Under Illinois law, a plaintiff desirous of a trial by jury must file a demand with the clerk at the time the action is commenced; otherwise, the party waives a jury. 735 ILCS 5/2-1105. Although Lewis & Clark demanded a jury trial when it filed its answer in the Illinois action, the Illinois Court of Appeals for the Fifth District, which includes Madison County, has held that a defendant in a Jones Act suit has no right to a jury trial. *See Allen v. Norman Bros., Inc.*, 678 N.E.2d 317, 320-21 (5th Dist. 1997).

Lewis & Clark's right to limitation and exoneration and Claimant's right to a jury trial. Therefore, this Court retains its exclusive jurisdiction and must deny Claimant's Motion to Dissolve Restraining Order.

Respectfully submitted,

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[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF the COMPLAINT OF EAGLE MARINE INDUSTRIES, INC., A CORPORATION, AND PARAGON MARINE SERVICES, INC., A CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY,	)	Case No. 4:97CV00357 ERW
Petitioners,	)	
Vs.	)	
MADONNA MACKE, as Special, Administratrix of the Estate Of WILLIAM ROBERT MACKE,	)	
Respondent\Claimant.	)	

MEMORANDUM AND ORDER

(Filed Oct. 16, 1997)

This matter is before the Court upon the motions of petitioners for default or for judgment [document #15], and on the motions of respondent to dissolve the restraining order [document #11]and to increase the amount of stipulation or security [document # 12].

This is a maritime limitation of liability action brought by Eagle Marine Industries, Inc. (Eagle), and Paragon Marine Services, Inc. (Paragon), pursuant to 46 U.S.C. § 181 et seq. On March 4, 1997, this Court entered an order enjoining the filing or commencement of any

actions against petitioner related to a March 1, 1997 incident involving the M\V MARY BURKE. The stipulation for value approved by the Court on March 4, 1997, establishes the value of the limitation fund as $50,000. All potential claimants were given until September 1, 1997, to file their claims with this Court. Claimant filed her claim on September 2, 1997, and petitioners move for default arguing that it is untimely.

However, September 1, 1997, was Labor Day, which is a legal holiday on which this Court is closed *See* Fed.R.Civ.P. 6. On September 2, 1997, Madonna Macke, as special administratrix of the estate of Robert Macke, filed claims for damages in excess of $50,000 arising from the incident. Since those claims could not have been filed on a legal holiday, the Court accepts the September 2, 1997 filing as timely. Petitioners' motion for default will be denied.

Petitioners also move for judgment on the basis that claimant's pleading is deficient under Supplemental Rule F(5), Fed.R.Civ.P., for Admiralty and Maritime Claims. 'Rule F(5) of the Federal Rules of Civil Procedure Supplemental Rules for Admiralty and Maritime Claims provides that

> Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

Petitioners contend that the Claim for Damages for Wrongful Death served and filed on September 2, 1997, fails to satisfy these requirements because it does not list any facts upon which she relies to support her claim. Petitioners seek to dismiss the claim or have judgment entered in their favor, due to the deficiencies of claimant's filing. The Court agrees with claimant that the pleading requirements of Supplemental Rule F(5) are similar to those Fed.R.Civ.P. 8(a). *See In re Triple Screw Marine Towing, Inc.*, 1994 WL 151101, *. (E.D.La. 1994). When a complaint is analyzed under the pleading standards, the allegations should be construed favorably to the pleader, and the claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Claimant has stated that her husband was a crew member on the subject vessel, that the vessel was unseaworthy, that her husband died as a result of the negligence of others and the unseaworthiness, and that she is entitled to maintain an action to recover. The Court finds that these allegations are sufficient to state a claim for wrongful death and survivorship benefits, and that these allegations adequately put petitioners on notice of the claims against them. Petitioners' motion for judgment will be denied.

Claimant moves the Court for dissolution of the injunction in order that she may pursue actions for negligence and unseaworthiness in state court. The Limitation of Liability Act confers upon a vessel owner, when loss or damage occurs without the owner's privity or knowledge, the right to limit its liability to the value of its interest in the vessel and the vessel's pending freight. 46

U.S.C. § 183; *Valley Line Co. v. Ryan*, 771 F.2d 366, 372-73 (8th Cir. 1985) . The vessel owner may seek judgment for exoneration from or limitation of liability and upon filing its complaint and depositing adequate surety for the ship and her freight, the district court must enjoin all actions which relate to the subject of the limitation proceeding and require all persons who have claims to assert them in the limitation action. Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims, Fed.R.Civ.P.; *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979).

There is no right to a jury trial in actions instituted in admiralty, but claims such as those arising under the Jones Act carry with them a right to jury trial. *Fitzgerald v. United Sates Lines Co.*, 374 U.S. 16, 20-21 (1963). Although the district court's admiralty jurisdiction is exclusive, the jurisdictional grant expressly "sav[es] to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333; *Valley Line Co.*, 771 F.2d at 372.

In an attempt to accommodate the shipowner's right to limit its liability in equity without a jury and the claimant's right to a trial by jury for common law and statutory claims, the courts have recognized two exceptions to the district court's exclusive jurisdiction over limitation of liability proceedings. One is when the limitation fund exceeds the aggregate of the claims asserted against it. The other is when there is a single claim. In the single claim situation, the single claimant must concede that the value of the fund is the value of the vessel and its freight, waive any right to a claim of res judicata based on another court's judgment, and concede the district court's exclusive jurisdiction to rule on all questions pertaining

to limitation of liability *Id.* at 372-73. When only one claim has been filed and "nothing appears to suggest the possibility of any other claim," the district court must dissolve its injunction to permit the single claimant to pursue a separate action and a jury trial. *Langnes v. Green*, 282 U.S 531, 540 (1931); *Universal Towing Co. v Barrale*, 595 F.2d 414, 418-19 (8th Cir. 1979).

In this case, there is something to indicate the presence of another claim. Petitioners have filed evidence that another entity seeks to recover from them for damages sustained in the March 1, 1997 accident. A claim has been submitted directly to petitioners from Peavey Barge Lines, for damages to one if its barges.

Additionally, petitioners note that plaintiff has failed to make a jury demand in both her complaint and amended complaint filed in Illinois State Court. Since plaintiff has not requested a jury trial, there is not a conflict between the shipowner's right to limitation and the claimant's right to a jury trial, and so this Court should not consider dissolving the injunction. *See Universal Towing Co.*, 595 F.2d at 417; *Valley Line Co.*, 771 F.2d at 372.

Finally, petitioners are correct that plaintiff has failed to include the proper stipulations that are prerequisites to dissolving a restraining order and allowing a claimant to proceed in state court. Claimant's motion to dissolve the restraining order will be denied.

The last matter before this Court is claimant's motion to increase the amount of stipulation or security of the limitation fund. Claimant disputes the $50,000 amount set by petitioners as the value of the subject vessel and her

freight. This amount was determined ex parte, and submitted to the Court without claimant having the ability to contest it. Therefore, the Court will order a hearing on claimant's motion, and require the parties to submit briefs, not in excess of 5 pages, addressing the value of the subject vessel. The briefs shall be due three days prior to the hearing date, and the hearing will only be canceled upon joint notification to the Court that the matter is now moot.

Accordingly,

IT IS HEREBY ORDERED that petitioners' motion for default or for judgment [document #15] is **DENIED.**

IT IS FURTHER ORDERED that claimant's motion to dissolve the restraining order [document # 11] is **DENIED.**

IT IS FURTHER ORDERED that claimant's motion to increase the stipulation or security of the limited fund is **SET FOR HEARING** on *Friday, October 31, 1997 at 11:00 a.m.* The parties shall submit briefs on the issue by October 28, 1997, and petitioner's shall include appraisals or other valuation documents upon which they rely.

Dated this 16 Day of October, 1997.

/s/ E. Richard Webber
E. RICHARD WEBBER
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT OF EAGLE MARINE INDUSTRIES, INC., A CORPORATION, AND PARAGON MARINE SERVICES, INC., A CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY	)	No. 4:97CV00357 ERW

MOTION FOR LEAVE TO FILE OUT OF TIME

(Filed Illegible 10, 1997)

Now comes claimant by and through her, undersigned atto-neys, The Lakin Law Firm, P.C., and respectfully asks this Honorable Court for leave to file out of time her Memorandum In Opposition to Motion for Order Noting Default of Macke's Claim or, in the Alternative, for an order Striking Macke's Claim and Granting Judgment in Favor of Plaintiff, instanter, and in support of said motion states as follows:

1. Claimant's law firm was involved in a complete move of their facilities upon receipt of the Motion and the move was not completed in order to allow proper and thorough research until the time for response had passed.

2. that the filing of claimant's Memorandum out of time will not cause prejudice or undue delay in this matter.

WHEREFORE, for the foregoing reasons, Claimant's Motion for Leave to File Out of Time should be allowed.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability,	)	No. 4:98CV00503 MLM
Petitioner,	)	
JAMES FRANKLIN LEWIS,	)	
Claimant.	)	

CLAIMANT JAMES LEWIS' REPLY MEMORANDUM IN SUPPORT OF CLAIMANT'S MOTION TO DISSOLVE INJUNCTION

Now comes claimant, James Lewis, by his undersigned counsel of record, and files his Reply Memorandum In Support of Claimant's Motion to Dissolve Injunction.

Defendant's argument boils down to the single contention that a Jones Act seaman's right to obtain dissolution of the monition is defeated by his failure to demand a jury trial in a state court suit arising from the same injury as the instant limitation proceeding – even where the defendant makes such a jury demand. This argument should be rejected based on the additional stipulation filed herewith, as well as under the existing stipulation.

Claimant contemporaneously files a stipulation that his claim does not exceed the $400,000.00. (Second Stipulation of Claimant Lewis.) The limitation fund is $450,000.00. (Petitioner's Security For Value.) The stipulation that the claim does not exceed the value of the limitation fund brings this cause squarely into the absention doctrine of *Langnes v. Green*, 282 U.S. 531 (1931) under both prongs of the Court's analysis.

"A federal court should abstain in two situations. First, the court should allow the case to proceed in state court if the value of the limitation fund . . . exceeds the aggregate of the total number of claims filed against the owner. [citation] . . . Second, where a single claimant brings an action against the shipowner *seeking damages in excess of the limitation fund*, the district court should return the case to state court so long as the claiman [sic] makes stipulations adequate to protect the shipowner's rights under the Limitation Act." *Complaint of McCarthy Brothers Co./Clark Bridge*, 83 F.3d 821, 831 (7th Cir.1996.)

Claimant's stipulation that the value of the claim is less than the value of the limitation fund requires this court to abstain under *Langnes* for both of the reasons articulated by the Supreme Court. Under the first prong, the total value of all claims is less than the value of the limitation fund. This requires resolution of the remaining claims in state court because petitioner has already obtained the rights conferred upon it by the limitation of liability statute, that is the owner has successfully limited the amount of the claim to the value of the limitation fund. In this context, there is no compelling federal reason to require the claimant to litigate his Jones Act claim

in the district court. On the contrary, *Langnes* requires that the state court action be permitted to proceed.

But claimant has also satisfied the second prong of the *Langnes* analysis. Defendant properly acknowledges that *Langnes v. Green*, 282 U.S. 531 (1931) requires modifying the stay of state court proceedings in single claimant actions. (Petitioner's Memorandum at p. 3.) Regardless of whether the claimant seeks a jury trial in state court, "where a single claimant brings an action against the shipowner seeking damages in excess of the value of the limitation fund, the district court should return the case to state court so long as the claimant makes stipulations adequate to protect the shipowner's rights under the limitation act. [citation] Specifically, the claimant must waive any claim of res judicata from the state court proceedings relevant to the issue of limited liability and concede the exclusive jurisdiction of the federal courts to determine all issues relating to limitation of liability." (*McCarthy Brothers Company/Clark Barge, as Owner, etc.*, 83 F.3d, 821, 831-832, 1996 A.M.C. 2153, 2165.) This analysis does not require that claimant demand a jury trial. Neither the Supreme Court nor any Court of Appeals has held that claimant's right to obtain dissolution of the injunction of state court proceedings requires that the claimant demand a jury trial in state court.

In the instant case, as in *McCarthy Brothers*, claimant has stipulated to the district court's retaining jurisdiction to determine all issues relating to limitation. Accordingly, the injunction should be dissolved and the state court action permitted to go forward.

But, even more compelling than in *McCarthy Brothers*, claimant in the cause **sub judice** has stipulated that his claim does *not* exceed the value of the limitation fund. This removes any federal interest in retaining jurisdiction because the end of the exercise of federal jurisdiction – limitation of liability – has already been met. This takes this cause out of the *Eagle Marine* analysis in which no such stipulation was filed.

In short, claimant's stipulations require dissolution of the injunction against state court proceedings entered by this court.

Accordingly, claimant prays for an order:

1) dissolving the injunction against further proceedings in state court; and

2) staying further proceedings in this district court.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

BY: /s/ Roy C. Dripps

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability,	)	No. 4:98CV00503 MLM
Petitioner,	)	
JAMES FRANKLIN LEWIS,	)	
Claimant.	)	

SECOND STIPULATION OF JAMES LEWIS

Now comes James Lewis, claimant herein, by his undersigned counsel, and stipulates that the value of his claim in the above matter is less than $400,000.00, and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc.

/s/ James Lewis
James Lewis, by Roy Dripps,
his attorney

[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

In the Matter of the Complaint of LEWIS & CLARK MARINE, INC., as Owner or Owner PRO HAC VICE of THE M/V KAREN MICHELLE for Exoneration from or Limitation of Liability,	)	No. 4:98CV00503 MLM
Petitioner,	)	
JAMES FRANKLIN LEWIS,	)	
Claimant.	)	

PROPOSED ORDER

This cause comes before the Court on claimant's motion to dissolve the injunction entered on May 11, 1998 against further proceedings in state court. Claimant has stipulated that the value of his claim does not exceed the value of the limitation fund of $450,000.00. (Second Stipulation of James Lewis, filed July 24, 1998.) Because claimant has, in effect, conceded the vessel owner's claim for limited liability, this Court is required to abstain from further proceedings. *Langnes v. Green*, 282 U. S. 531 (1931); *Complaint of McCarthy Brothers Co./Clark Bridge*, 83 F.3d 821, 831 (7th Cir.1996.)

Accordingly, claimant's motion to dissolve the injunction is GRANTED; further proceedings in this Court are hereby stayed until further order of court.

SO ORDERED.

_____

District Judge

IMPORTANT: RETURN THIS FORM TO THE CLERK'S OFFICE PROMPTLY, BUT NOT LATER THAN TWENTY DAYS AFTER THE APPEARANCE ANSWER OR RESPONSIVE PLEADING

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

LEWIS & CLARK MARINE PETITIONER vs JAMES FRANKLIN LEWIS CLAIMANT	Case No. 4:98CV503 MLM

CONSENT TO JURISDICTION BY
UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U.S.C. Sec. 636(c)(1), the undersigned (party*) (counsel of record for CLAIMANT) in the above-captioned civil matter hereby voluntarily consents to have a United States Magistrate Judge conduct any an I all further proceedings in the case, including trial and entry of a final judgment, with direct review by the Eighth Circuit Court of Appeals if an appeal is filed.

Date: 7-30-98 /s/ Roy Dripps
Signature
Print Name: Roy Dripps

DISTRICT JUDGE OPTION

Pursuant to Title 28, U.S.C. Sec. 636(c)(2), the undersigned (party*) counsel of record for _____) in the above-

captioned civil matter hereby acknowledges the availability of a United States Magistrate Judge but elects to have this case randomly assigned to a United States District Judge.

Date: _____

_____
Signature
Print Name: _____

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Consent was served by mail) (by hand delivery) on all parties of record in this cause, this _____ day of _____, 19__

_____
Signature

*Corporations may execute only by counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT OF LEWIS & CLARK MARINE, INC., AS OWNER OR OWNER PRO HAC VICE OF THE M/V KAREN MICHELLE FOR EXONERATION FROM OR LIMITATION OF LIABILITY	)	Cause No. 4:98CV503 MLM In Admiralty

PETITIONER LEWIS & CLARK MARINE, INC.'S SUR-REPLY TO CLAIMANT'S REPLY IN SUPPORT OF CLAIMANT'S MOTION TO DISSOLVE RESTRAINING ORDER AND TO STAY THIS EXONERATION/LIMITATION ACTION

COMES NOW Petitioner, Lewis & Clark Marine, Inc. ("Lewis & Clark"), by and through its undersigned attorneys, and for its Sur-Reply to Claimant James Franklin Lewis' ("Claimant") Reply in Support of Claimant's Motion to Dissolve Restraining Order and To Stay This Exoneration/Limitation Action (the "Motion"), states as follows:

ARGUMENT

THIS COURT SHOULD DENY CLAIMANT'S MOTION BECAUSE: (A) CLAIMANT HAS WAIVED HIS RIGHT TO A JURY TRIAL IN HIS STATE COURT ACTION; (B) CLAIMANT HAS NOT MET THE *COLORADO RIVER* AND *MOSES H. CONE* EXCEPTIONAL CIRCUMSTANCES TEST; AND (C) CLAIMANT'S STIPULATIONS ARE INSUFFICIENT.

A. THIS COURT SHOULD DENY CLAIMANT'S MOTION BECAUSE CLAIMANT HAS WAIVED HIS RIGHT TO A JURY TRIAL IN HIS STATE COURT ACTION.

Federal Courts allow Jones Act seamen to proceed with their state court actions despite the pendency of federal exoneration/limitation actions in order to accommodate Jones Act seamen's right to a jury trial. *Complaint of McCarthy Bros. Co./Clark Bridge*, 83 F.3d 821, 826 (7th Cir. 1996). Claimant concedes this critical issue at pages 1 and 2 of his Memorandum in Support: "In single claimant cases, courts have consistently held the district court must dissolve the injunction so that the claimant may pursue a separate action with a jury trial . . . this is to effectuate the intent of the 'savings to suitors' clause which provides for a Jones Act seaman to bring his case in state court and have it tried before a jury." Claimant does not dispute that he does not want a jury trial in his state court action or that Lewis & Clark has no right to a jury trial in the state court action under *Allen v. Norman Bros., Inc.*, 678 N.E.2d 317, 320-21 (Ill. App. Ct. 1997). Because the state court action will not be tried to a jury, there is no reason to let the state court action proceed, or to stay this federal exoneration/limitation action.

In a desperate effort to avoid this inescapable conclusion, Claimant has now stipulated that the value of his claim is less than the limitation fund ($450,000.00). Claimant then leaps to the conclusion that, as a result of his stipulation that his claim is for less than the limitation fund, there is no "federal interest in retaining jurisdiction because the end of the exercise of federal jurisdiction – limitation of liability – has already been met." Claimant's Reply Memorandum at p. 3. This argument fails because this Court not only has the right to limit Lewis & Clark's liability, but also has the right to exonerate Lewis & Clark from liability. In an exoneration/limitation proceeding, the first issue to be decided by the Court is whether the vessel owner is entitled to complete exoneration due to the absence of negligence by the vessel owner. *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979).

Claimant solely relies upon *Langnes v. Green*, 282 U.S. 531 (1931), and *McCarthy Bros.* for his erroneous contention that this Court is required to dissolve the restraining order against the state court action. These cases are distinguishable. The claimants in *Langnes* and *McCarthy Bros.* did not waive their right to a jury trial, and in both cases, the courts noted that the vessel owner filed its exoneration/limitation action after the claimant had brought an action in state court. *See Langnes* at 541 (In finding that the district court should abstain, the Supreme Court expressly noted that the state court's jurisdiction attached first because the claimant commenced his state court action first). In the instant case, it is undisputed that Lewis & Clark filed its complaint for exoneration from or limitation of liability on March 24, 1998, and Claimant

filed his own complaint in the Circuit Court of Madison County, Illinois on April 3, 1998, ten days later.

Claimant's Motion must be denied because the justification for allowing a Jones Act seaman to proceed in state court (his right to a jury trial) simply does not exist in this case.

B. THIS COURT SHOULD DENY CLAIMANT'S MOTION BECAUSE CLAIMANT HAS NOT MET THE *COLORADO RIVER* AND *MOSES H. CONE* EXCEPTIONAL CIRCUMSTANCES TEST.

Because Claimant does not seek a jury trial in his state court action, the specialized abstention rules applicable to exoneration/limitation cases do not apply; general abstention principles control. It is now soundly established under *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976) and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1 (1981) that where dismissal or stay of a federal action is under consideration due to the existence of a parallel state court action and the federal court's interest in wise judicial administration, the federal court has a virtually unflagging obligation to exercise its jurisdiction unless it can be said that the circumstances permitting the dismissal or stay are exceptional. *Insurance Co. of State of Pennsylvania v. Syntex Corp.*, 964 F.2d 829, 833 (8th Cir. 1992). Several factors are to be considered in determining exceptional circumstances: (1) whether either court has assumed jurisdiction over a res; (2) the inconvenience of the federal forum; (3) the desirability of avoiding piecemeal litigation; (4) the order in which the courts obtained

jurisdiction; (5) the progress made in the cases; (6) whether state or federal law controls; and (7) the adequacy of the state forum to protect the parties' rights.

These factors require that this Court deny Claimant's Motion: (1) this Court has assumed jurisdiction over a res (the limitation fund); (2) this Court could not be less convenient than the Madison County Circuit Court based in Edwardsville and Granite City; (3) denying Claimant's Motion to Dissolve the Restraining Order and To Stay the Exoneration/Limitation Action would insure that the entire litigation is disposed of by this Court; (4) this Court obtained jurisdiction first; (5) in this federal exoneration/limitation action, there has already been a Claim of Damages for Injury filed, an Answer to Complaint for Exoneration from or Limitation of Liability filed, a case management order entered, a trial date set (August 16, 1999), consents to magistrates authorized, and substantial discovery propounded by both parties. The same cannot be said for the state court action. Furthermore, as a result of the scheduling conference and the extensive pleadings filed with the district court, this Court is significantly more familiar than the state court with the facts and legal issues that need to be resolved in this case; (6) federal law controls – Claimant seeks relief under the Jones Act 46 U.S.C. § 688 and general maritime law; and (7) the state forum is in no better position to protect the parties' rights.

Established abstention principles require that this Court deny Claimant's Motion.

C. THIS COURT SHOULD DENY CLAIMANT'S MOTION BECAUSE CLAIMANT'S STIPULATIONS ARE INSUFFICIENT.

Even if Claimant had a right to proceed with his state court action, which he does not, he would have to stipulate: (a) that the amount of the stipulation for value is sufficient; (b) that he waives any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in the state court; and (c) that all issues relating to limitation will be litigated in the limitation proceeding. *Jefferson Barracks Marine Serv., Inc. v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985), Claimant's Motion includes stipulations (b) and (c), but not (a).

Furthermore, when a claimant attempts to stipulate that his damages are less than the limitation fund, that stipulation must clearly set forth the claimant's intention that the vessel owner shall not, in any set of circumstances, be exposed to liability in excess of the limitation fund. *Complaint of Dammers & Vanderheide*, 836 F.2d 750, 759 (2nd Cir. 1988). Claimant's Second Stipulation filed on or about July 24, 1998 merely states that "the value of his claim in the above matter is less than $400,000.00, and less than the value of the limitation fund." This stipulation is inadequate. It should also state that Claimant stipulates that his damages are less than $400,000.00 and that in the event there is a judgment or recovery in any state court action in excess of $450,000.00, whether against Lewis & Clark, or any other liable parties who may crossclaim or claim over against Lewis & Clark, in no event will Claimant James Franklin Lewis seek to enforce said excess judgment or recovery insofar as same may expose Lewis & Clark to liability in excess of

$450,000.00 pending the adjudication of Limitation of Liability in the District Court." *Dammers* at 759. The stipulations should be signed by the Claimant as well as his attorney.

This Court should deny Claimant's Motion because Claimant's stipulations are inadequate.

CONCLUSION

For the foregoing reasons, this Court must deny Claimant's Motion to Dissolve the Restraining Order and To Stay The Exoneration/Limitation Action.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

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[Certificate Of Service Omitted In Printing]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT OF LEWIS & CLARK MARINE, INC., AS OWNER OR OWNER PRO HAC VICE OF THE M/V KAREN MICHELLE FOR EXONERATION FROM OR LIMITATION OF LIABILITY.	)	Case No. 4:98CV0503 (MLM) In Admiralty

MEMORANDUM AND ORDER

(Filed Dec. 22, 1998)

This case involves a petition by vessel owner Lewis & Clark Marine, Inc. ("Lewis & Clark") for a limitation of liability under the Limitation of Liability Act, a federal statute intended to limit the liability of vessel owners who are not negligent and have no privity to or knowledge of the negligent cause of a maritime accident. Lewis & Clark filed the petition in this Court in response to a purported accident which occurred on March 17, 1998, causing injury to Claimant James Franklin Lewis ("Claimant"), an employee of Lewis & Clark. Presently pending before the Court is Claimant's motion to dissolve the restraining order and to stay this exoneration/limitation action. [18] The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).[26]

I.

PROCEDURAL HISTORY

Lewis & Clark is a Missouri corporation with its principal place of business in Granite City, Illinois. At all times relevant hereto, Lewis & Clark was the owner or owner pro hac vice of the M/V KAREN MICHELLE. On March 17, 1998, Claimant was purportedly injured while working for Lewis & Clark as a crewmember aboard the M/V KAREN MICHELLE. On March 24, 1998, Lewis & Clark filed its "Complaint for Exoneration From Or Limitation of Liability" ("Complaint") with this Court pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*

On April 2, 1998, Claimant filed a lawsuit against Lewis & Clark in Madison County, Illinois, No. 98-L-233, seeking damages for personal injuries allegedly sustained in the March 17, 1998 incident. He asserted three counts: (1) negligence under the Jones Act, 46 U.S.C. § 688, *et seq.*; (2) unseaworthiness; and (3) maintenance and cure. Claimant did not demand a jury trial in the Illinois state court action and does not dispute that the case will not be tried to a jury.

In the instant case, on May 8, 1998, the Court entered an "Order Approving Stipulation for Costs and Security for Value and Directing the Issuance of Notice, and Restraining Suits." In the order, the Court approved the surety bond in the amount of $450,000 as security for Lewis & Clark's interest in the M/V KAREN MICHELLE. The Court further directed that any person with a claim related to the March 17, 1998 incident file said claim with the Court on or before June 12, 1998. Finally, the Court

enjoined the institution or prosecution of any other suits against Lewis & Clark relating to the incident involving the M/V KAREN MICHELLE on March 17, 1998.

On June 9, 1998, Claimant timely filed a claim of damages for injuries in the instant cause of action and filed his Answer to Plaintiff's Complaint. In his claim, Claimant stated that "[he is] entitled to maintain an action to recover damages for the injuries sustained and hereby claim[s] an amount in excess of the value of $450,000.00 stated in petitioner's stipulation for value of its interest in the M/V KAREN MICHELLE, no part of which has been paid." *See* Claim of Damages for Injury, pg. 2.

On June 9, 1998, Claimant also filed a motion to dissolve the restraining order entered by the Court on May 8, 1998. In his motion, Claimant asserted that he was the sole claimant who was injured on the M/V KAREN MICHELLE seeking damages as a result of the incident occurring on March 17, 1998 and, therefore, is entitled to a dissolution of the order of injunction. He also stipulated to the following: (1) Mr. Lewis expressly waived any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in state court; and (2) Mr. Lewis stipulated to Lewis & Clark's right to litigate issues relating to the limitation in this limitation proceeding.

Thereafter, Mr. Lewis filed another stipulation with this Court. That stipulation provides:

> Now comes James Lewis, claimant herein, by his undersigned counsel, and stipulates that the value of his claim in the above matter is less than $400,000.00, and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc.

See Second Stipulation of James Lewis.

Claimant now seeks a dissolution of the order of injunction so that he may proceed with the cause of action he presently has pending in the Circuit Court of Madison County. Whether or not to dissolve the restraining order is the issue presently pending before the Court. ***Gorman v. Cerasia,*** 2 F.3d 519, 523 (3d Cir. 1993) (The district court has discretion to vacate a previously-issued stay in a limitation proceeding).

II.

ANALYSIS

The Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*, was passed "to encourage the development of American merchant shipping." ***Complaint of Dammers & Vanderheide,*** 836 F.2d 750, 754 (2d Cir. 1988) (quoting ***Lake Tankers Corp. v. Henn,*** 354 U.S. 147, 150 (1957)). The Act achieves this purpose by exempting innocent shipowners from liability, beyond the amount of their interest. ***In re Dammers,*** 836 F.2d at 754-55 (quoting ***Lake Tankers,*** 354 U.S. at 151). *See also* ***Beiswenger Enterprises Corp. v. Carletta,*** 86 F.3d 1032, 1036 (11th Cir. 1996), *cert. denied* 117 S.Ct. 2455 (1997). Specifically, the Act permits a vessel owner to limit its liability to the value of the vessel and its then pending freight, provided that the loss or damage is incurred without the "privity or knowledge" of the owner. 42 U.S.C. § 183; ***Valley Line Co. v. Ryan,*** 771 F.2d 366, 372-73 (8th Cir. 1985). "In the typical situation of a

corporate owned ocean vessel the privity and knowledge scrutiny focuses in on whether the shore-based high-leveled management is aware (or should have been) of the likelihood of the occurrence happening after the ship is underweigh [sic]." *Gorman*, 2 F.3d at 523 (quoting *Tittle v. Aldacosta*, 544 F.2d 752, 756 (5th Cir. 1977)).

When a shipowner faces potential liability, the vessel owner files a claim with the federal court to invoke the protection of the Act. The vessel owner must deposit with the district court an amount representing the value of the vessel and its freight ("limitation fund"). At that point, the district court stays all related claims against the vessel owner pending in any other forum and directs all potential claimants to file their claims with the district court within a specified time period. ***In re Muer***, 146 F.3d 410, 414 (6th Cir. 1998); ***Beiswenger Enterprises***, 86 F.3d at 1035; ***In re Dammers***, 836 F.2d at 755.

> Thereafter, in a proceeding known as a *concursus*, the district court, sitting in admiralty without a jury, determines "whether there was negligence; if there was negligence, whether it was without the privity and knowledge of the owner; and if limitation is granted, how the [limitation] fund should be distributed. *Universal Towing [v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979)]. It is only in this way that the admiralty court can achieve the primary purpose of the act – "to provide a marshalling of assets [and] the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full." *In re Moran Transportation Corp.*, 185 F.2d 386, 389 (2d Cir. 1950) [remaining citations omitted].

In re Dammers, 836 F.2d at 755. ***See also In re Complaint of Consolidation Coal Company***, 123 F.3d 126, 132 (3d Cir. 1997) (a complaint under the Limitation Act follows the following process: The district court, sitting in admiralty without a jury, first determines whether there was negligence; second, if there was negligence, whether it was without the privity and knowledge of the owner; and, finally, if limitation is granted, how the limitation fund should be distributed), *cert. denied* 118 S.Ct. 1380 (1998); ***Beiswenger***, 86 F.3d at 1036 (the damage claimants bear the initial burden of establishing liability, and the shipowner then bears the burden of establishing the lack of privity or knowledge; if the vessel owner is found liable, but limitation is granted, the admiralty court distributes the limitation fund among the damage claimants in an equitable proceeding known as a concursus).[1]

Federal courts have exclusive admiralty jurisdiction to determine whether a vessel owner is entitled to limited liability. ***In re Muer***, 146 F.3d at 417; ***Beiswenger***, 86 F.3d at 1036. In limitation proceedings, as in all admiralty cases, there is no right to a jury trial. ***Beiswenger***, 86 F.3d at 1037. However, the same statute that grants the federal courts exclusive admiralty jurisdiction saves to suitors "all other remedies to which they are otherwise entitled." ***In re Muer***, 146 F.3d at 417 (quoting 28 U.S.C. § 1333(1)).

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[1] Title 28 U.S.C. § 1333 provides, in relevant part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The "saving to suitors" clause preserves common law rights and remedies, including the right to a jury trial, in the forum of the claimant's choice. ***In re Consolidation Coal,*** 123 F.3d at 132; ***Beiswenger,*** 86 F.3d at 1037; ***Odesco Oil and Gas Co v. Bonnette,*** 74 F.3d 671, 674 (5th Cir.), *cert. denied* 117 S.Ct. 79 (1996); ***In re Dammers,*** 836 F.2d at 755. Thus, a tension exists between the exclusive jurisdiction vested in the admiralty courts to determine a vessel owner's right to limited liability and the savings to suitors clause. ***In re Muer,*** 146 F.3d at 417; ***Besiwenger,*** 86 F.3d at 1037; ***Jefferson Barracks Marine Service, Inc. v. Casey,*** 763 F.2d 1007, 1009 (8th cir. 1985).

In an attempt to reconcile the "recurring and inherent conflict" between these two statutory mandates, ***In re Dammers,*** 836 F.3d at 754, courts have created two exceptions to the admiralty court's exclusive jurisdiction over limitation proceedings in which a claimant must be allowed to pursue a claim in the forum of his choice. Under either exception, "[t]he court's primary concern is to protect the shipowner's absolute right to claim the Act's liability cap, and to reserve the adjudication of that right in the federal forum." ***In re Port Arthur Towing Co.,*** 42 F.3d 312, 316 (5th Cir.) (quoting *Magnolia Marine Transp. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992)), *cert. denied* 516 U.S. 1995; ***Odesco,*** 74 F.3d at 674 (allowing the state court action to proceed is contingent on protecting the absolute right of the shipowner to limit his or her liability).

The first exception occurs if the value of the limitation fund (value of the vessel plus freight) exceeds the total value of all claims asserted against the vessel owner. In such a case, the vessel owner is not exposed to liability

in excess of the limitation fund and, thus the vessel owner's rights under the Limitation Act are not implicated. ***Beiswenger,*** 86 F.3d at 1037; ***Odesco,*** 74 F.3d at 674; ***Port Arthur,*** 42 F.3d at 316 (when a shipowner is not exposed to potential liability in excess of the value of the vessel and its freight, the shipowner's absolute right to limit its liability is not implicated and the savings to suitors clause dictates that the admiralty court must allow suits pending against the shipowner in a common law forum to proceed); ***Magnolia Marine Transport Co. v. Laplace Towing Corp.,*** 964 F.2d 1571, 1575 (5th Cir. 1992) (the Supreme Court case *Lake Tankers Corp. v. Henn*, makes "crystal clear" that the Act is directed at maritime misfortunes where the losses claimed exceed the value of the vessel and freight; where the claim does not exceed that value, the saving-to-suitors clause dictates that the admiralty court must allow suits pending against the shipowner in a common law forum to proceed); ***S&E Shipping Corp,*** 678 F.2d 636, 643 (6th Cir. 1982) ("Where the limitation fund is sufficient to pay all potential claims . . . a concursus is unnecessary because the claimants need not compete among themselves for larger portions of a limited fund. This exception to the concursus proceeding protects the claimant's right to a jury trial in the forum of his choice without undermining the Limitation Act's policy of limiting the shipowner's liability to the value of the vessel and its freight.").

The second exception occurs when a single claimant brings an action against the shipowner seeking damages in excess of the value of the vessel. Because a major purpose of the concursus proceeding is to resolve competing claims to the limitation fund, the single claimant

may try liability and damages issues in the forum of his choice by filing stipulations that protect the shipowner's right to have the admiralty court ultimately adjudicate its claim to limited liability. ***Beiswenger,*** 86 F.3d at 1037. The Eighth Circuit Court of Appeals has consistently held that, in order to invoke the single claimant exception, a single claimant must make three stipulations: (1) concede that the value of the fund is the value of the vessel and its freight; (2) waive any right to a claim of res judicata based on another court's judgment; and (3) concede the district court's exclusive jurisdiction to rule on all questions pertaining to limitation of liability. ***Jefferson Barracks,*** 763 F.2d at 1010; ***Valley Line,*** 771 F.2d at 372-73.

If either the adequate fund exception or the single claimant exception applies, it is an abuse of discretion for the court to fail to dissolve the injunction against other legal proceedings and thus deprive a claimant of his choice of forum. ***Valley Line,*** 771 F.2d at 373. To require a claimant to proceed in federal court where there is only a single claimant or where the fund is adequate to cover all claims would

> transform [the Limitation of Liability Act] from an instrument protective of a vessel owner's liability to "an offensive weapon by which the shipowner could deprive suitors of their common-law rights." *In re S&E Shipping Corp.*, 678 F.2d at 643 n. 12 (citing *Lake Tankers Corp.*, 354 U.S. at 152-53, 77 S.Ct. 1269). "In view of the explicit mandate from Congress the [claimant] must not be thwarted in her attempt to employ her common-law remedy in the state court

> where she may obtain trial by jury." *Lake Tankers Corp.*, 354 U.S. at 152, 77 S.Ct. 1269.

In re Muer, 146 F.3d at 419.[2]

Reviewing the facts of this case, the Court finds that it should dissolve the injunction as requested in Claimant's motion. The court finds that Claimant has clearly met the adequate fund exception. The value of the limitation fund (here, $450,000) exceeds the total value of all claims asserted against the vessel owner (here, $400,000). Thus, Lewis & Clark is not exposed to liability in excess of the limitation fund and its rights under the Limitation Act are not implicated. ***Beiswenger,*** 86 F.3d at 1037; ***Odesco,*** 74 F.3d at 674; ***Magnolia Marine Transport,*** 964 F.2d at 1575; ***S&E Shipping Corp,*** 678 F.2d at 643.

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[2] As an aside, after a district court dissolves the injunction, the following procedures take place. If the state court holds the vessel owner liable for the accident and assesses damages exceeding the limitation fund, the parties must return to the admiralty court for a determination of the privity or knowledge issues. If limitation is denied, because the vessel owner fails to establish a lack of privity or knowledge, the claimant may then enforce his or her state court judgment for damages exceeding the limitation fund. Accordingly, the shipowner's absolute right to claim limited liability and to reserve the adjudication of that claim in the admiralty court, has been fully protected. ***Beisenger,*** 86 F.3d at 1038); ***In re McCarthy Brothers Company/Clark Bridge,*** 83 F.3d 821, 828 (7th Cir.) (If the shipowner either (1) wins in the state court; or (2) loses, but only in an amount less than the value of his ship and its cargo, then the need for further proceedings in federal court is obviated. If the shipowner is found liable for more than the value of his ship and its cargo in the state action, further proceedings in the federal limitation action may be necessary, but only where the claimant contests the limitation), *cert. denied* 117 S.Ct. 361 (1996).

Lewis & Clark argues that, even though Claimant meets the adequate fund exception, the Court should not dissolve the restraining order because Lewis & Clark not only has the right to limit its liability in this proceeding but it also has the right to exoneration from liability in this Court. The Court disagrees.

The purpose of the Limitation Act is *limitation*. The Limitation Act does not mention exoneration and, although Rule F provides a vessel owner with the right to demand exoneration, it does not guarantee "exoneration as a matter of right" nor does it reserve the question exclusively to the federal courts. ***In re Antill,*** 1997 WL 399603 (E.D.La. 1997). "[T]he Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and above that granting him limited liability." ***In re Antill,*** 1997 WL 399603 (E.D.La. 1997). Thus, the Court finds that the mere fact Lewis & Clark is seeking exoneration in this cause of action as well as limitation of liability does not hinder this Court's ability to dissolve the injunction.[3]

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[3] The Court also finds that Claimant may meet the single claimant exception. Certainly, there is no dispute that Claimant is a single claimant. The nature of the accident belies the possibility of multiple claims and no other claims were filed in this court after the Court notified potential claimants to do so. Additionally, Lewis & Clark has not made any representations to this Court suggesting the possibility of additional claimants.

Lewis & Clark contends that a claimant's right to a jury trial is the only common law remedy granted to the claimant under the savings to suitor clause. In light of the fact that our Claimant has waived that right in his Madison County state court action, Lewis & Clark argues that tension no longer exists between the Limitation of Liability Act and the savings to suitors clause.

Certain stipulations are required of a claimant before a court can dissolve a restraining order, although the

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Thus, according to Lewis & Clark, Claimant cannot rely upon the single claimant exception for purposes of dissolving the instant injunction.

The Court does not find this issue to be as clear cut as Lewis & Clark would suggest. The express language of the savings to suitors clause saves to suitors "all other remedies to which they are entitled." This language does not expressly state that a right to a jury trial is the *only* remedy saved under the clause. Although some courts have elected to focus the conflict between the savings clause and the Limitation Act on the claimant's right to a jury trial, there is no holding in any Supreme Court case or Circuit Court of Appeals decision providing that a right to a jury trial is the *only* remedy saved to a suitor. For instance, many cases seem to suggest that the savings clause grants to a claimant the right to have his claim tried in a "forum of his choice." *See, e.g.,* ***Odesco Oil,*** 74 F.3d at 675 (although the claimants' interest in litigating in the *forum of their choice* is substantial, we will accede to the choice only if it is accompanied by stipulations fully protecting the vessel owner's right to limit liability); ***In re Antill,*** 1997 WL 399693, *5 ("Given adequate protection of the shipowner's right, a claimant is entitled to proceed *in the forum of his or her choice,* regardless of the judicial inefficiency this decision may cause. As the Court finds that claimant has adequately protected the shipowner's right to limit his liability, the Court must respect claimant's right to proceed *in the forum of his choice,* even if this choice results in an overlap between the federal and state cases").

This Court is hesitant to conclude, without express language in the savings clause or clear guidance by the Supreme Court or the Circuit Courts of Appeals, that the *only* remedy saved to suitors is a right to a jury trial outside the limitation proceeding. Thus, the mere fact that a claimant has waived his right to a jury trial in a state court proceeding would not necessarily render the single claimant exception inapplicable. *But see* ***In re Eagle Marine Industries, Inc.,*** No. 4:97CV0357 (ERW), Memorandum and Order (October 16, 1997). However,

stipulations appear to be required only in the single claimant case. Nonetheless, assuming they apply to the adequate fund exception as well, the court finds that Claimant has made the necessary stipulations to protect any rights Lewis & Clark may have to a limitation proceeding in this Court. As stated earlier, a single claimant must stipulate to the following: (1) concede that the value of the fund is the value of the vessel and its freight; (2) waive any right to a claim of res judicata based on another court's judgment; and (3) concede the district court's exclusive jurisdiction to rule on all questions pertaining to limitation of liability. ***Jefferson Barracks,*** 763 F.2d at 1010. Lewis & Clark has conceded that Claimant has properly entered the second and third stipulations identified above. However, as noted by Lewis & Clark, Claimant has not meet the first stipulation. Nonetheless, the Court finds this inadequacy is not fatal to Claimant's motion to dissolve because Claimant amended his claim to $400,000, which had the effect of conceding the value of the fund and of limiting the judgment Claimant could seek in a state court proceeding. Therefore, that stipulation is unnecessary in this case. ***Valley Line Company,*** 771 F.2d at 373.[4]

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as stated earlier, in light of the fact that Claimant has met the adequate fund exception, the Court need not reach this issue.

[4] To the extent that Lewis & Clark argues that Claimant's stipulations were unenforceable against Claimant because they were signed only by his attorney, the argument is also without merit. "While it may be the general rule that an attorney has no implied authority to compromise a client's cause of action to the client's prejudice, it is clear that an attorney does have the implied power to take all action with reference to procedural matters. [citation omitted] [Claimant's] attorney filed the stipulations in the course of following the procedure which not only maximized his client's claim but also preserved his client's substantive right to a jury trial in the forum of his choosing. There is no doubt that the stipulations are enforceable against [claimant]." ***Valley Line Co.,*** 771 F.2d at 376.

III.

CONCLUSION

In light of the fact that the adequate fund exception applies in this case, it would be an abuse of discretion for this Court to fail to dissolve the injunction against other proceedings and, thus, deprive Claimant of his choice of forum. ***Valley Line,*** 771 F.2d at 373. Therefore, Claimant's motion to dissolve will be granted and he will be permitted to pursue his state court action.

Typically, if the vessel owner either (1) wins in the state court; or (2) loses, but only in an amount less than the value of his ship, then the need for further proceedings in federal court is obviated. ***In re McCarthy Brothers,*** 83 F.3d at 828. Here, Claimant has conceded that his claim is less than the value of the ship. Thus, it does not appear to the Court that there are any circumstances which would warrant the parties returning to this Court following the conclusion of the state court action. Nonetheless, in an abundance of caution, the Court will stay the present proceedings pending the conclusion of the Madison County State Court action and will administratively close this case, subject to re-opening by either party if warranted.

Accordingly,

IT IS HEREBY ORDERED that the motion of Claimant James Franklin Lewis to dissolve restraining order is **GRANTED. [18]**

IT IS FURTHER ORDERED that the restraining order entered by the Court on May 8, 1998, is hereby **DISSOLVED.**

UNITED STATES DISTRICT COURT –
EASTERN MISSOURI
INTERNAL RECORD KEEPING

AN ORDER, JUDGMENT OR ENDORSEMENT WAS SCANNED AND FAXED TO THE FOLLOWING INDIVIDUALS ON 12/24/98 by berow

4:98cv503 Lewis & Clark Marine vs

28:1333 Admiralty

Richard Burke – 2749	Fax: 618-254-0193
Roy Dripps – 3014	Fax: 618-254-0193
James O'Brien – 3973	Fax: 314-241-6056
Christopher Swenson – 74100	Fax: 314-241-6056

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT OF LEWIS & CLARK MARINE, INC. AS OWNER OR OWNER PRO HAC VICE OF THE M/V KAREN MICHELLE FOR EXONERATION FROM OR LIMITATION OF LIABILITY,	**Case No. 4:98CV503 MLM**
Petitioner,	**In Admiralty**
vs.	
JAMES F. LEWIS,	
Claimant	

NOTICE OF APPEAL

Notice is hereby given that Petitioner Lewis & Clark Marine, Inc. hereby appeals to the United States Court of Appeals for the Eighth Circuit pursuant to 28 U.S.C. §§ 1292(a)(1) and 636. This appeal is taken from this court's interlocutory Order entered in this action on December 22, 1998 dissolving the injunction previously

entered by the Court on May 8, 1998. The parties do not consent to an appeal on the record to a district Judge.

Respectfully submitted,

LEWIS, RICE & FINGERSH, L.C.

By: /s/ James V. O'Brien
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing was sent via first class U.S. mail, postage prepaid, this 21st day of January, 1999, to Roy Dripps, The Lakin Law Firm, 301 Evans Avenue, P.O. Box 27, Wood River, Illinois, 62095-0027.

/s/ Illegible

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-1346

IN THE MATTER OF THE COMPLAINT OF LEWIS & CLARK MARINE, INC.

Appellant,

v.

JAMES F. LEWIS

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 4:98CV0503 (MLM)
The Honorable Mary Ann L. Medler,
U.S. Magistrate Judge

BRIEF OF APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

In this case, the court below misapplied the admiralty and maritime law of the United States. The Court allowed a Jones Act plaintiff to stay progress of a prior filed Limitation of Liability proceeding, and proceed in a nonjury case in Illinois state court. This ruling did not simply allow the Claimant to pursue his "common law rights" to a jury trial under the "saving to suitors" clause, but rather allowed outright forum shopping in derogation of law and a proper exercise of federal jurisdiction. Because the ruling below misconstrues the "saving to suitors" clause, and improperly stays the properly instituted Limitation of Liability proceeding, it constitutes an abuse of discretion and should be reversed.

Lewis & Clark Marine, Inc. ("Lewis & Clark"), filed its Complaint for Exoneration From or Limitation of Liability with the United States District Court for the Eastern District of Missouri on March 24, 1998, pursuant to the Limitation of Liability Act, 46 U. S. C. § 181 *et. seq.*; Rule 9(h) Fed.R.Civ.P., and Rule F of the Supplement Rules for Certain Admiralty and Maritime Claims. On April 2, 1998, Claimant filed a Complaint under the Jones Act and General Maritime Law against Lewis & Clark in the Circuit Court of Madison County, Illinois, 98-L-233, for alleged injuries sustained while working for Lewis & Clark aboard the M/V KAREN MICHELLE. Claimant did not seek a trial by jury in state court. On May 8, 1998, Judge Catherine Perry enjoined the institution or prosecution of any other suits against Lewis & Clark relating to the alleged casualty. Claimant filed a Motion to Dissolve Restraining Order and certain "stipulations." Lewis

& Clark resisted Claimant's Motion, and argued that since Claimant waived his right to a jury in his state court action and his stipulations were insufficient, the Motion must be denied. On December 22, 1998, the Honorable Mary Ann L. Medler dissolved the restraining order. Lewis & Clark seeks a reversal of the Order and respectfully requests oral argument of twenty minutes.

CORPORATE DISCLOSURE STATEMENT

For its Corporate Disclosure Statement, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellant Lewis & Clark Marine, Inc. states that it is a privately held corporation and has no parent companies, subsidiaries, or affiliates that have issued shares to the public. Furthermore, a Corporate Disclosure Statement was filed herein by Appellant on February 17, 1999.

[Table Of Contents And Authorities Omitted In Printing]

JURISDICTIONAL STATEMENT

This is an appeal from a Memorandum and Order granting Claimant's Motion to Dissolve Restraining Order, as entered by the Honorable Magistrate Judge Mary Ann L. Medler of the United States District Court for the Eastern District of Missouri. Lewis & Clark's Complaint for Exoneration From or Limitation of Liability brought pursuant to 46 U.S.C. § 181 *et seq.* was an admiralty and maritime claim within the meaning of Rule 9(h); Fed.R.Civ.P. and for the purposes of Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims. The district court had original jurisdiction of

Lewis & Clark's Complaint under 46 U.S.C. § 181 *et seq.* The parties consented to the jurisdiction of United States Magistrate Judge Medler pursuant to 28 U.S.C. § 636(c). The district court's Memorandum and Order granting Claimant's Motion to Dissolve Restraining Order entered on December 22, 1998, was an interlocutory order of the United States District Court dissolving an injunction as set forth in 28 U.S.C. § 1292(a)(1), thereby conferring appellate jurisdiction with this Court. Lewis & Clark's Notice of Appeal was timely filed on January 21, 1999.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY STAYING PETITIONER'S EXONERATION FROM AND LIMITATION OF LIABILITY PROCEEDING AND LIFTING THE STAY IMPOSED ON LITIGATION INCLUDING CLAIMANT'S ILLINOIS STATE COURT JONES ACT CLAIM WHEN THE JONES ACT CLAIMANT HAS WAIVED HIS RIGHT TO AND IS NOT SEEKING A JURY TRIAL IN THAT SAME ILLINOIS STATE COURT PROCEEDING.

- *In re Complaint of Eagle Marine Indus. Inc.*, No. 4:98CV0357 (ERW), Memorandum and Order (October 16, 1997)
- *Complaint of S & E Shipping Corp.*, 1985 AMC 2940 (N.D. Ohio)

II. THE DISTRICT COURT ERRED BY STAYING PETITIONER'S EXONERATION FROM AND LIMITATION OF LIABILITY PROCEEDING AND LIFTING THE STAY IMPOSED ON LITIGATION INCLUDING THE CLAIMANT'S ILLINOIS STATE COURT JONES ACT CLAIM WHEN THE CLAIMANT'S STIPULATIONS FAILED TO ADEQUATELY PROTECT THE RIGHTS OF LEWIS & CLARK.

- *Valley Line Co. v. Ryan*, 771 F.2d 366 (8th Cir. 1985)
- *Jefferson Barracks Marine Serv. Inc. v. Casey*, 763 F.2d 1007 (8th Cir. 1985)
- *Complaint of Dammers v. Vanderheide*, 836 F. 2d 750 (2nd Cir. 1988)

STATEMENT OF THE CASE

I. Nature Of The Case And Course Of Proceedings Below.

Claimant was allegedly injured on March 17, 1998 when working for Lewis & Clark as a deckhand aboard the M/V KAREN MICHELLE. On March 24, 1998, Lewis & Clark, the owner or, alternatively, the owner *pro hac vice* of the M/V KAREN MICHELLE filed a Complaint for Exoneration from or Limitation of Liability with this Court pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*; Rule 9(h) Fed.R.Civ.P.; and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims. Lewis & Clark was seeking exoneration from or limitation of its liability with respect to the alleged injury suffered by Claimant or any other claimant. Attached thereto was an Affidavit of Value valuing the M/V KAREN MICHELLE at $450,000 as of March 17, 1998.

On April 3, 1998, ten (10) days after Lewis & Clark filed its Complaint with the United States District court for the Eastern District of Missouri, Claimant filed his

own Complaint in the Circuit Court of Madison County, Illinois (the "state court action"), 98-L-233, seeking damages for personal injuries allegedly sustained in the marine casualty. Claimant's state court action alleged three (3) counts: (1) negligence under the Jones Act, 46 U.S.C. § 688 *et seq.*; (2) unseaworthiness; and (3) maintenance and cure. Claimant did not file a jury demand in the state court action and under existing Illinois precedent is prevented from obtaining a jury trial. Lewis & Clark demanded a jury trial when it filed its answer in the state court action. However, upon Claimant's motion, the Honorable Philip J. Kardis granted Claimant's Motion to Strike Jury Demand on February 11, 1999.

On May 8, 1998, Judge Catherine Perry executed the Order staying Claimant's state court action. On May 11, 1998, the Order Approving Stipulation for Costs and Security for Value and Directing Issue of Notice and Restraining suits entered by Judge Catherine Perry was filed. This Court then approved the surety bond in the amount of $450,000 as security for Lewis & Clark's interest in the M/V KAREN MICHELLE, directed that any person with a claim related to the alleged incident file said claim with the Court on or before June 17, 1998 and enjoined the institution or prosecution of any other suits against Lewis & Clark relating to said alleged marine casualty. Petitioner then filed a Notice of Stay in the state court action with a copy of the Order attached.

Claimant's first attempt to avoid the forum in the Eastern District of Missouri came on May 15, 1998. At that time, Claimant filed his Motion to Dismiss or Transfer for Improper Venue asserting that according to Supplemental Admiralty and Maritime Claims Rule F(9),

venue was improperly laid in the Eastern District of Missouri and that it should properly lay within the Southern District of Illinois. Lewis & Clark responded by asserting that venue was properly laid in the Eastern District of Missouri under Rule F(9) because Lewis & Clark filed its Complaint on March 24, 1998, ten (10) days before Claimant filed his state court action against Lewis & Clark on April 2, 1998. Claimant voluntarily dismissed his Motion on June 5, 1998 because no suit was commenced against Lewis & Clark before Lewis & Clark filed it [sic] Complaint in federal court.

Claimant's second attempt to avoid the forum came on June 9, 1998. At that time, Claimant filed his Answer to Complaint for Exoneration From or Limitation of Liability, Claim of Damages for Injury and Motion to Dissolve Restraining Order. In the Motion to Dissolve Restraining Order ("Motion"), Claimant sought to stay the instant proceeding and obtain leave to proceed in state court. In advancing the Motion, Claimant asserted that he

> waives any claim of *res judicata* relevant to the issue of limited liability based on any judgment obtained in state court; and stipulates to Petitioner's right to litigate issues relating to the limitation in this limitation proceeding.

These "stipulations" were not signed by or filed separately by Claimant, but were merely asserted as a paragraph in Claimant's Motion. As a result of these "stipulations," Claimant submitted the Court was required to dissolve the injunction and allow the state court action to proceed.

On July 8, 1998, Lewis & Clark filed its Memorandum in Opposition asserting that Claimant's Motion should be denied based upon Claimant's waiver of his right to a jury trial applied to the existing precedent in this district court, as set forth in Judge Webber's Opinion of October 16, 1997 in *Complaint of Eagle Marine Indus. Inc.*, No. 4:97CV00357 ERW.[1] Lewis & Clark further asserted that Claimant's failure to request a jury trial in his state court action obviated the conflict between the "saving to suitors" clause and the Limitation Act, requiring the federal court retain its exclusive jurisdiction and stay the state court action.

In his Reply filed with the court on July 24, 1998, Claimant attached a Second Stipulation of James Lewis, executed by his attorney Roy Dripps, which provided in part:

> James Lewis . . . stipulates that the value of his claim in the above matter is less than $400,000.00, and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc.

As a result of his stipulation, Claimant asserted that the federal court should abstain because the value of the limitation fund exceeded the aggregate value of the total number of claims filed against the owner and because there was only one claimant.

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[1] A copy of this and other unpublished opinions are included in the addendum pursuant to 8th Cir. R. 28A(I).

In its Sur-Reply of August 14, 1998, Lewis & Clark argued that regardless of the applicable exception, Claimant's Motion should be denied because Claimant waived his right to a jury trial in his state court action; Claimant did not meet the *Colorado River* and *Moses H. Cone* exceptional circumstances test allowing federal court abstention; and Claimant's Stipulations were insufficient. Lewis & Clark further asserted that Claimant's final stipulation did not change the analysis because no stipulation protected Lewis & Clark's right to exoneration from liability in federal court, the first issue to be decided in a limitation proceeding.

On December 22, 1998, the district court entered its Order, granting Claimant's Motion; dissolving the restraining order entered by the Court on May 8, 1998; staying the federal court action pending final resolution of the state court action; and administratively closing the file, subject to reopening on motion of either party as warranted. In her Memorandum, Judge Medler held that Claimant met the so-called "adequate fund" exception to the federal court's exclusive admiralty jurisdiction over limitation proceedings because the $450,000 limitation fund exceeded the total value of all claims asserted against the vessel owner, which amounted to $400,000: The Court also held that the Claimant may meet the single claimant exception. The Court expressly disagreed with Lewis & Clark's assertions that it has the right to exoneration from liability in addition to limitations liability in federal court and that Claimant's waiver of his right to a jury trial precluded the application of the two exceptions to the federal court's exclusive admiralty jurisdiction over these types of claims.

Lewis & Clark filed a timely Notice of Appeal pursuant to 28 U.S.C. § 1292(a)(1). In its appeal, Lewis & Clark asserts that the Court abused its discretion by failing to properly consider the effect of Claimant waving his right to a jury trial in his state court action and erred by failing to require the appropriate stipulations to protect Lewis & Clark's rights for exoneration from or limitation of liability.

II. Statement of Undisputed Facts.

Due to the nature of this appeal, the only pertinent undisputed facts are procedural in nature. Judge Medler's decision did not turn on disputed facts, but the underlying rights are procedures available to shipowners and claimants under the law. These procedural facts that are the basis of the appeal are set forth in *Nature of the Case and Course of Proceedings Below, supra* so they will not be reiterated herein. The pertinent, undisputed facts are for the most part contained in the *Procedural History* section of Judge Medler's Memorandum and Order. Otherwise, the only undisputed fact are that Lewis & Clark is a Missouri corporation with its principal place of business in Granite City, Illinois and at all times relevant herein, Lewis & Clark was the owner or, alternatively, the owner *pro hac vice* of the M/V KAREN MICHELLE.

SUMMARY OF ARGUMENT

Judge Medler abused her discretion and committed reversible error by granting Claimant's Motion to Dissolve Restraining Order thereby staying Lewis & Clark's exoneration from and limitation of liability proceeding

and lifting the stay imposed on litigation including the state court action. Judge Medler further erred in finding that Claimant's stipulations adequately protected Lewis & Clark's rights under the Limitation Act. This Court reviews Judge Medler's Order dissolving the injunction for abuse of discretion and her decision that Claimant's stipulations adequately protected Lewis & Clark's rights in federal court *de novo*.

Claimant waived his right to a jury trial in his state court action and Lewis & Clark's jury demand has been stricken. Consequently, there is no conflict between Lewis & Clark's rights under the Limitation of Liability Act and Claimant's rights under the "saving to suitors" clause. As a result of the conflict that often occurs, federal courts have developed two exceptions to their exclusive admiralty jurisdiction under which they abstain. The two exceptions to the federal court's exclusive admiralty jurisdiction – the single claimant and adequate fund exceptions – were developed so a claimant would not lose the right protected by 28 U.S.C. § 1333's "saving to suitors" clause, that is, the right to pursue a common-law remedy in a state court where a jury could be obtained. If the claimant does not proceed before a jury, however, there is no conflict and no reason for the admiralty court to abstain. It was reversible error for Judge Medler to apply the single claimant and adequate fund exceptions without first finding that there was a conflict between Claimant's rights under the "saving to suitors" clause and Lewis & Clark's rights under the Limitation Act. Because there is no conflict, this case must proceed in federal court. In so ruling, Judge Medler disregarded 28 U.S.C. § 1333 and

the rule of law established in this District Court in *In re Eagle Marine Indus. Inc.*, No. 4:97CV0357 ERW.

Moreover, Claimant did not stipulate that he conceded the sufficiency of the limitation fund to cover damages, that his claim for damages in the state court action was less than $400,000, or that in no event would he seek to enforce an excess judgment or recovery insofar as it may expose Lewis & Clark to liability in excess of $450,000 pending the adjudication of Limitation of Liability in the district court. As a result, Claimant's stipulations do not adequately protect Lewis & Clark's rights under the Limitation Act. Judge Medler initially found that Claimant's stipulation was inadequate but reversed field and found that the stipulation was unnecessary, relying upon an erroneous fact without support in the record. Based upon Judge Medler's findings, the stipulations do not adequately protect Lewis & Clark's right to exoneration.

The District Court abused its discretion by granting Claimant's Motion to Dissolve Restraining Order considering Claimant waived his right to a jury trial and the District Court erred in finding that Claimant's stipulations adequately protected Lewis & Clark's rights. Therefore, the District Court's Order should be reversed.

ARGUMENT

I. The District Court Abused its Discretion by Staying Petitioner's Exoneration From and Limitation of Liability Proceeding and Lifting the Stay Imposed on Litigation Including the Claimant's Illinois State Court Jones Act Claim When the Claimant Has Failed to and is Not Seeking a Jury Trial in that Same Illinois State Court Proceeding.

The denial, modification, or dissolution of an injunction in a limitation proceeding is appealable as a matter of right under 28 U.S.C. § 1292(a)(1), *Matter of Bowoon Sangsa Co., Ltd.*, 720 F.2d 595, 597 (5th Cir. 1983) and a district court's decision to dissolve an injunction or lift a stay is reviewed for abuse of discretion. *F.D.I.C. v. Bell*, 106 F.3d 258, 262 (8th Cir. 1997); *Odeco Oil and Gas Co., Drilling Div. v. Bonnette*, 74 F.3d 671, 674 (5th Cir. 1996). In the instant case, Judge Medler abused her discretion.

A shipowner facing potential liability may file and seek a judgment regarding its complaint for exoneration from and limitation of liability in federal district court pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*, and Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims. *In re Complaint of Eagle Marine Indus. Inc.*, No. 4:97CV0357 (ERW), Memorandum and Order (October 16, 1997). Federal courts have exclusive admiralty jurisdiction to determine whether a vessel owner is entitled to limited liability. *Beiswenger Enterprises Corp. v. Carletta*, 83 F.3d 1032, 1036 (11th Cir. 1996). In certain situations, this exclusive jurisdiction of the federal courts under the Limitation of Liability Act conflicts with the "saving to suitors" clause of 28 U.S.C. § 1333, which excepts from the district court's

exclusive jurisdiction over admiralty matters the right of suitors to seek "all other **remedies** to which they are entitled." (emphasis added). There is no right to a jury trial in actions instituted in admiralty, but claims such as those under the Jones Act carry with them a right to jury trial. *Eagle Marine*, at 4 *citing Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-21 (1963). The significance of this conflict is that claimants have no right to a jury in admiralty actions and thus lose their right to pursue common-law remedies before a jury when forced into admiralty court under the Limitation Act.

As a result of this conflict, federal courts have allowed Jones Act seamen, like Claimant herein, to proceed with their state court actions in order to accommodate the Jones Act seamen's right to a jury trial. *S&E Shipping Corp. v. Chesapeake & O. Ry. Co.*, 678 F.2d 636 (6th Cir. 1982); *Eagle Marine*, at 4. Federal courts have resolved the conflict, beginning with *Langnes v. Green*, 282 U.S. 531, 539-40 (1931), by allowing claimants to pursue state court actions under two exceptions: (1) when the value of the limitation fund exceeds the total value of all claims filed; and (2) when there is a one claimant action. These two limited exceptions were created to preserve a claimant's right to his common law remedies as required by the "saving to suitors" clause. These exceptions require claimants, however, to make certain stipulations to adequately protect the petitioner's right to limitation before a federal court can properly dissolve an injunction restraining a state court action. *Jefferson Barracks Marine Services v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985).

Courts have only applied these two exceptions, however, when a remedy provided to a claimant conflicts

with the remedies to which a claimant is entitled through the "saving to suitors" clause. *Valley Line Co. v. Ryan*, 771 F.2d at 372 (8th Cir. 1985). The entire body of case law regarding the two exceptions to the federal court's exclusive admiralty jurisdiction is premised upon avoiding the conflict between the Limitation of Liability Act and the claimant's remedies provided through the "saving to suitors" clause. When there is not a conflict between the statutes there is no reason to apply either of the two exceptions. Many courts proceed by first determining if one of the two exceptions applies, presumably as a result of an obvious conflict between the vessel owners and claimants' statutory rights. Nonetheless, without an implicit or express finding that a conflict exists, a court should not proceed with the exceptions to the court's exclusive admiralty jurisdiction.

As in many of the published cases, Judge Medler was overwhelmed by *obiter dicta* concerning the "saving to suitors" clause, and failed to analyze the plain language of the statute. 28 U.S.C. § 1333 saves to suitors all other **remedies** to which they are entitled, meaning, those not available in federal admiralty court. It clearly does not preserve forum choice. By definition, the "saved" remedy is pursued in a court other than a federal court. Rather, the "saving to suitors" clause preserves the remedy found at common law, before the advent of federal admiralty jurisdiction. *Waring v. Clark*, ___ U.S. ___, 12 L.Ed. 226 (5 How.) 444, 461 (1847).

Moreover, there is a difference between a right and a remedy. The "saving to suitors" clause preserves only the remedy, that is, "the means employed to enforce a right or to redress and injury." *Chelentis v. Luckenbach S.S. Co.*,

247 U.S. 372, 381 (1918). A right, on the other hand, is a well-founded or acknowledged claim. *Id.* There is no assertion that the rights are different in the federal proceeding versus the Illinois state court forum. Indeed, the rights asserted (claims under the Jones Act, and for unseaworthiness and maintenance and cure) are the same and available in both. The only difference is the remedy, or the means employed to enforce the right.

It is no coincidence, then, that the cases facing this issue have spoken almost uniformly about the availability of the jury trial in the state forum. Since the right is the same in either court, plaintiffs have sought to save the remedy, that is, the means employed to redress the injury. The only difference in the means in this context is the right to trial by jury. Indeed, in the *Valley Line* case relied upon so heavily by the court below, the following passage appears and was quoted by Judge Medler:

> In view of the explicit mandate from Congress the [claimant] must not be thwarted in her attempt to employ her common-law remedy in the state court where she may obtain trial by jury.

(Order at 8). It was the preservation of the jury trial remedy that required the lifting of the stay.

This same clear statutory analysis was on display in *Complaint of S & E Shipping Corp.*, 1982 A.M.C. 2940 (N.D. Ohio 1982). There, faced with a similar issue, and a failure of the claimant to demand a jury trial, the court denied the motion to dissolve the injunction:

> [T]he claimant never demanded a jury on the issues raised in its cross claim against S & E. The

> claimant does not assert any other remedy it is denied by the matter being determined in the admiralty court, nor does one come to mind.

Id. at 2943. This interpretation of the statute is precisely what is missing from the cases cited by Judge Medler, like *Odeco*, that speak loosely and unpersuasively about forum choice, and is missing from her analysis as well.

Neither Claimant nor Judge Medler has pointed to one case where any remedy other than the right to a jury trial was determinative of whether the federal court would abstain from the proceeding. This is because there are none in cases like this, where a personal injury claimant seeks relief from the stay. On the other hand, the two cases cited above, *S & E Shipping* and *In re Complaint of Eagle Marine*, held that the claimant's waiver of his right to jury trial obviates the federal courts obligation to dissolve the restraining order. Judge Medler disagreed with Lewis & Clark's analysis and the above-referenced precedent by citing two cases which seem to suggest that the savings clause grants to a claimant the right to have his claim tried in a "forum of his choice." *Odeco*, 74 F.3d at 675 and *In re Antill*, 1997 WL 399603 (E.D.La. 1997). Upon further reading, the *Odeco* court held that "[t]he shipowner's right to limitation takes precedence over the claimant's right to proceed in the forum of their choice." 74 F.3d at 675.[2] As pointed out above, *Odeco's dicta*, cited

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[2] Judge Medler offers in a lengthy footnote that a claimant's right to have his claim tried in the forum of his choice may be a Jones Act remedy preserved by the "saving to suitors" clause Clearly this is not the case. First, forum selection is not a remedy; only remedies are preserved under the "saving to

by Judge Medler, fails to withstand statutory analysis. There is no statutory analytical authority for Claimant's or the court's proposition.

Judge Medler also erred by failing to follow controlling precedent from the United States District Court for the Eastern District of Missouri. It is improper to disregard the rule of law established by existing precedent from an earlier case from the same district court. *Imperial Stone Cutters, Inc. v. Schwartz*, 370 F.2d 425, 429 (1966); *Mueller v. Allen*, 514 F.Supp. 998, 1000-01 (1981). In the case of *In re Eagle Marine Industries, Inc.*, No. 4:97CV0357 ERW (E.D. Mo. October 16,1997), Judge Webber was presented with facts nearly identical to the case at bar. Like the instant case, the claimant had moved for the dissolution of the court's injunction "in order that she may pursue actions for negligence and unseaworthiness in state court." *Id.* at *4. The petitioner sought exoneration from and limitation of liability and the claimant had waived her right to a jury in Illinois state court. *Id.* On claimant's motion to dissolve the restraining order, Judge Webber held in his Memorandum and Order that "[s]ince plaintiff has not requested a jury trial, there is not a conflict between the shipowner's right to limitation and the claimant's right to a jury trial, and so this Court should not consider dissolving the injunction." *Id.* at *6.

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suitors" clause. Second, the Jones Act provides that a seaman may "maintain an action for damages at law, with the right of trial by jury." 46 U.S.C. § 688. This does not grant a Jones Act claimant his choice of forum. Lastly, Jones Act suits are subject to transfer under the doctrine of *forum non conveniens* diminishing the claimant's right to any particular venue.

Judge Webber would not *consider* dissolving the injunction because of claimant's failure to pursue a jury trial.

Instead of following the precedent of Judge Webber in *Eagle Marine*, Judge Medler applied both the adequate fund exception and the single claimant exception to the district court's exclusive admiralty jurisdiction over limitation actions. Under the *Eagle Marine* precedent Judge Medler should not have even considered dissolving the injunction when she learned that claimant waived his right to a jury trial in his state court action. To the contrary, however, Judge Medler asserted that "there is no holding . . . that a right to a jury trial is the only remedy saved to a suitor [and that] cases seem to suggest that the savings clause grants to a claimant the right to have his claim tried in a forum of his choice." (Order at 9). In short, not only was Judge Webber's ruling sound, Judge Medler failed to provide any sound reason to not follow it or deviate from its holding in this case.

II. The District Court Erred by Staying the Petitioner's Exoneration From and Limitation of Liability Proceeding and Lifting the Stay Imposed on Litigation Including the Claimant's Illinois State Court Jones Act Claim When the Claimant's Stipulations Failed to Adequately Protect the Rights of Lewis & Clark.

Whether a stipulation adequately protects a party's rights under the Limitation of Liability Act is a question of law that is reviewed *de novo*. *In re Complaint of Port Arthur Towing Co. ex rel. M/V MISS CAROLYN*, 42 F.3d 312, 316-17 (5th Cir. 1995) (reviewing *de novo* the adequacy of a stipulation under the Limitation Act.). In the instant case, Claimant's "stipulations" do not adequately

protect Lewis & Clark and the Court erred in finding to the contrary.

Assuming *arguendo* that a claimant in a Limitation of Liability proceeding has the right to proceed in his state court action without a jury, the claimant is required to stipulate: (a) that the amount of the stipulation for value is sufficient; (b) that he waives any claim of *res judicata* relevant to the issue of limited liability based on any judgement obtained in state court; and (c) that all issues relating to limitation will be litigated in the limitation proceeding. *Jefferson Barracks Marine Serv. Inc. v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985). In its pleadings before the district court, Lewis & Clark conceded the adequacy of Claimant's stipulations as to (b) and (c) but challenged the adequacy of Claimant's stipulation as to (a). The stipulation for damages must clearly set forth the claimant's intention that the vessel owner shall not, in any set of circumstances, be exposed to liability in excess of the limitation fund. *Complaint of Dammers v. Vanderheide*, 836 F.2d 750, 759 (2d Cir. 1988). Claimant's inadequate stipulation fails this test. It provides that "James Lewis . . . stipulates that the value of his claim in the above matter is less than $400,000.00, and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc."

Judge Medler began her analysis by expressly finding that stipulation (a) was inadequate. (Order at 10). She then noted that the inadequacy was not fatal because Claimant amended his claim to $400,000, "which had the effect of conceding the value of the fund and or limiting the judgment Claimant could seek in a state court proceeding." (Order at 10). The Order then pleaded that the

stipulation was unnecessary in this case. Such a finding is a clear legal error and in contradiction to the established law and facts. Eighth Circuit law clearly requires all three stipulations when applying the two exceptions to the federal court's exclusive admiralty jurisdiction. *Valley Line Co.*, 771 F.2d at 373. In her Order, Judge Medler expressly found that stipulation (a) concerning the adequacy of the fund to cover damages was unnecessary, despite finding that the adequate fund exception applied to the instant case. Such a finding is erroneous.

Judge Medler predicated this finding on the fact that Claimant amended his claim to $400,000." (Order at 10 citing *Valley Line Co. v. Ryan*, 771 F.2d 366 (8th Cir. 1985), in which the claimant filed a motion to amend his complaint to change the damages he sought from $800,000 to $700,000, bringing the total value of all claims below the value of the limitation fund. Claimant herein **did not** amend his claim in either the federal or state court proceedings as asserted by Judge Medler, but merely stipulated that the value of his claim in the federal proceeding was less than $400,000. Therefore, Judge Medler's Order was based upon an erroneous factual supposition with absolutely no support in the record. Moreover, the stipulation did not limit Claimant's claim for damages in the state court action to $400,000, did not concede the sufficiency of the limitation fund, nor did it provide that in no event would Claimant seek to enforce an excess judgment or recovery insofar as it may expose Lewis & Clark to liability in excess of $450,000 pending the adjudication of Limitation of Liability in the district court, as required by *Dammers*, 836 F.2d at 759. These deficiencies are not technical. It should be clear that Claimant's stipulations do

not adequately protect Lewis & Clarks rights under the Limitation of Liability Act.

Second, Lewis & Clark also challenged the adequacy of the stipulations because they were not signed by Claimant. Once again Judge Medler, quoted *Valley Line* and found that an attorney has the implied power to take all action with respect to procedural matters, leaving no doubt that the stipulations are enforceable against the claimant. (Order at 10, 11). In the instant case, however, there is serious doubt that the stipulations are enforceable against Claimant. Not only are none of the stipulations signed by Claimant, the first "stipulations" merely comprise one of the provisions of Claimant's Motion to Dissolve Restraining Order. Unlike the Second Stipulation of James Lewis filed on July 24, 1998, the Claimant never filed a stand-alone original stipulation as to stipulations (b) and (c). As a result of these procedural irregularities and the inadequacy of stipulation (a), there is no clear binding stipulations enforceable against Claimant. Thus, Lewis & Clark's rights under the Limitation of Liability Act are not adequately protected.

Lewis & Clark also submits that its rights are not adequately protected in light of the Court's finding that Lewis & Clark does not have the right to exoneration from liability in the district court. Rule F of the Supplemental Rules for Certain Admiralty and Maritime Claims provides that "[t]he complaint may demand exoneration from as well as limitation of liability. Consequently, shipowners may assert exoneration claims along with their limitation claim. *Texaco, Inc. v. Williams*, 47 F.3d 765, 769 (5th Cir. 1995) *citing Providence and New York Steamship Co v. Hill Co.*, 109 U.S. 578, 595 (1883) ("stating that the

questions to be settled in the proceedings are first, whether the ship or its owners are liable at all . . . and, secondly, if liable, whether the owners are entitled to a limitation of liability.")

Lewis & Clark conceded the adequacy of Claimant's stipulation that Lewis & Clark had the right to litigate issues relating to the limitation in this limitation proceeding because it believed the stipulation to include the issue of exoneration. As set forth in Lewis & Clark's Sur-Reply, In an exoneration/limitation proceeding, the first issue to be decided by the Court is whether the vessel owner is entitled to complete exoneration due the absence of negligence by the vessel owner." (Sur-Reply at 2 citing *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979); *See also In the Matter of the Complaint of Port Arthur Towing Co./the M/V MISS CAROLYN*, 42 F.3d 312, 317 (5th Cir. 1995) ("The whole doctrine of limitation of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit.") The exoneration issue – whether the vessel owner was negligent – is the first decision made by the court in a limitation action. The claimant bears the initial burden of establishing liability, and the shipowner then bears the burden of establishing the lack of privity or knowledge. (Order at 4,5 *citing Beiswegner Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1036 (11th Cir. 1996)). Consequently, federal courts have the exclusive jurisdiction to determine whether a vessel owner is entitled to limited liability *Id.* at 1036.[3]

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[3] Furthermore, even in cases without a stipulation regarding exoneration, federal courts have still reached conclusions regarding questions of facts effecting liability and

The better authorities are clear that a stipulation is inadequate if it fails to include exoneration. *See In the Matter of Tidewater, Inc.*, 938 F.Supp. 375, 379 (E.D.La. 1996) (Holding claimant's stipulation inadequate because it failed to protect the petitioner's right to litigate the issue of exoneration in federal court.); *In the Matter of Suard Barge Service, Inc.*, Civ. A. No. 96-3185, 1997 WL 97226, *3 (E.D.La. March 6, 1997) (To properly protect a vessel owner's rights under the Limitation Act, a claimant must stipulate on issues relevant to limitation of liability and/or exoneration in both federal and state court.); *In the Matter of Falcon Drilling Co.*, Civ. A. No. 94-3280, 1996 WL 363445 (E.D.La. June 28, 1996) (Claimant failed to waive any claim of *res judicata* for the exoneration, which intruded on the exclusive jurisdiction of the federal admiralty court.) Further, courts have properly lifted the stay against other proceedings if the claimant stipulated to the admiralty court's exclusive jurisdiction to determine all issues relating to exoneration and/or limitation of liability See *Texaco, Inc. v. Williams*, 47 F.3d 765, 770 (5th Cir. 1995). (Allowing claimants to pursue state law claims provided that the stipulations

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limitation in performing its analysis as to the shipowner's privity or knowledge. *Port of Pasco*, 324 F.2d 593 (9th Cir. 1963) ("the [federal] court was fee [sic] to make its own findings and conclusions with regard to whether supervisory personnel were negligent in such manner as to constitute privity and knowledge within the meaning of section 183(a). If this freedom of action left to the district court means anything, it means that the district court was at liberty to make findings and conclusions which might be expressly or implicitly inconsistent with those made by the state court as a basis for the latter's decision on liability.")

adequately protect the petitioner's right to receive exoneration or to limit liability.); *Odeco Oil & Gas Co. v. Bonnette*, 74 F.3d 671, 675-76 (5th Cir. 1996); *Magnolia Marine Transport Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir. 1992).

Lewis & Clark's right to exoneration before the federal court is also proper considering there is no conflict between Lewis & Clark's right to exoneration and Claimant's right to a jury trial. In fact there is no case cited by the district court or Claimant prohibiting the federal court's exclusive admiralty jurisdiction over exoneration when the claimant has waived his right to a jury trial in the state court proceeding. Based upon Judge Medler's erroneous finding that Lewis & Clark does not have the right to proceed on its exoneration from liability under the court's exclusive admiralty jurisdiction, Lewis & Clark's rights are not adequately protected by Claimant's stipulations.

As a result of Claimant's stipulations being inadequate for the above-stated reasons, the Court erred in finding that the Claimant met the adequate fund and single claimant exceptions to the federal court's exclusive admiralty jurisdiction. Because the exceptions did not apply based upon Claimant's stipulations herein, the district court abused its discretion by granting Claimant's Motion to Dissolve Restraining Order.

CONCLUSION

For all of the foregoing reasons, the district court's order granting Claimant's Motion to Dissolve should be reversed.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT OF LEWIS & CLARK MARINE, INC., AS OWNER OR OWNER PRO HAC VICE OF THE M/V KAREN MICHELLE FOR EXONERATION FROM OR LIMITATION OF LIABILITY.	)	**Case No. 4:98CV0503 (MLM)** **In Admiralty**

MEMORANDUM AND ORDER

(Filed Dec. 22, 1998)

This case involves a petition by vessel owner Lewis & Clark Marine, Inc. ("Lewis & Clark") for a limitation of liability under the Limitation of Liability Act, a federal statute intended to limit the liability of vessel owners who are not negligent and have no privity to or knowledge of the negligent cause of a maritime accident. Lewis & Clark filed the petition in this Court in response to a purported accident which occurred on March 17, 1998, causing injury to Claimant James Franklin Lewis ("Claimant"), an employee of Lewis & Clark. Presently pending before the Court is Claimant's motion to dissolve the restraining order and to stay this exoneration/limitation action. [18] The parties have consented to the jurisdiction of the undersigned United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).[26]

I.

PROCEDURAL HISTORY

Lewis & Clark is a Missouri corporation with its principal place of business in Granite City, Illinois. At all times relevant hereto, Lewis & Clark was the owner or owner pro hac vice of the M/V KAREN MICHELLE. On March 17, 1998, Claimant was purportedly injured while working for Lewis & Clark as a crewmember aboard the M/V KAREN MICHELLE. On March 24, 1998, Lewis & Clark filed its "Complaint for Exoneration From Or Limitation of Liability" ("Complaint") with this Court pursuant to the Limitation of Liability Act, 46 U.S.C. § 181 *et seq.*

On April 2, 1998, Claimant filed a lawsuit against Lewis & Clark in Madison County, Illinois, No. 98-L-233, seeking damages for personal injuries allegedly sustained in the March 17, 1998 incident. He asserted three counts: (1) negligence under the Jones Act, 46 U.S.C. § 688, *et seq.*; (2) unseaworthiness; and (3) maintenance and cure. Claimant did not demand a jury trial in the Illinois state court action and does not dispute that the case will not be tried to a jury.

In the instant case, on May 8, 1998, the Court entered an "Order Approving Stipulation for Costs and Security for Value and Directing the Issuance of Notice, and Restraining Suits." In the order, the Court approved the surety bond in the amount of $450,000 as security for Lewis & Clark's interest in the M/V KAREN MICHELLE. The Court further directed that any person with a claim related to the March 17, 1998 incident file said claim with the Court on or before June 12, 1998. Finally, the Court

enjoined the institution or prosecution of any other suits against Lewis & Clark relating to the incident involving the M/V KAREN MICHELLE on March 17, 1998.

On June 9, 1998, Claimant timely filed a claim of damages for injuries in the instant cause of action and filed his Answer to Plaintiff's Complaint. In his claim, Claimant stated that "[he is] entitled to maintain an action to recover damages for the injuries sustained and hereby claim[s] an amount in excess of the value of $450,000.00 stated in petitioner's stipulation for value of its interest in the M/V KAREN MICHELLE, no part of which has been paid." *See* Claim of Damages for Injury, pg. 2.

On June 9, 1998, Claimant also filed a motion to dissolve the restraining order entered by the Court on May 8, 1998. In his motion, Claimant asserted that he was the sole claimant who was injured on the M/V KAREN MICHELLE seeking damages as a result of the incident occurring on March 17, 1998 and, therefore, is entitled to a dissolution of the order of injunction. He also stipulated to the following: (1) Mr. Lewis expressly waived any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in state court; and (2) Mr. Lewis stipulated to Lewis & Clark's right to litigate issues relating to the limitation in this limitation proceeding.

Thereafter, Mr. Lewis filed another stipulation with this Court. That stipulation provides:

> Now comes James Lewis, claimant herein, by his undersigned counsel, and stipulates that the value of his claim in the above matter is less

> than $400,000.00, and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc.

See Second Stipulation of James Lewis.

Claimant now seeks a dissolution of the order of injunction so that he may proceed with the cause of action he presently has pending in the Circuit Court of Madison County. Whether or not to dissolve the restraining order is the issue presently pending before the Court. ***Gorman v. Cerasia,*** 2 F.3d 519, 523 (3d Cir. 1993) (The district court has discretion to vacate a previously-issued stay in a limitation proceeding).

II.

ANALYSIS

The Limitation of Liability Act, 46 U.S.C. § 181, *et seq.*, was passed "to encourage the development of American merchant shipping." ***Complaint of Dammers & Vanderheide,*** 836 F.2d 750, 754 (2d Cir. 1988) (quoting ***Lake Tankers Corp. v. Henn,*** 354 U.S. 147, 150 (1957)). The Act achieves this purpose by exempting innocent shipowners from liability, beyond the amount of their interest. ***In re Dammers,*** 836 F.2d at 754-55 (quoting ***Lake Tankers,*** 354 U.S. at 151). *See also* ***Beiswenger Enterprises Corp. v. Carletta,*** 86 F.3d 1032, 1036 (11th Cir. 1996), *cert. denied* 117 S.Ct. 2455 (1997). Specifically, the Act permits a vessel owner to limit its liability to the value of the vessel and its then pending freight, provided that the loss or damage is incurred without the "privity or knowledge" of the owner. 42 U.S.C. § 183; ***Valley Line Co. v. Ryan,*** 771 F.2d 366, 372-73 (8th Cir. 1985). "In the typical situation of a

corporate owned ocean vessel the privity and knowledge scrutiny focuses in on whether the shore-based high-leveled management is aware (or should have been) of the likelihood of the occurrence happening after the ship is underweigh [sic]." ***Gorman,*** 2 F.3d at 523 (quoting *Tittle v. Aldacosta,* 544 F.2d 752, 756 (5th Cir. 1977)).

When a shipowner faces potential liability, the vessel owner files a claim with the federal court to invoke the protection of the Act. The vessel owner must deposit with the district court an amount representing the value of the vessel and its freight ("limitation fund"). At that point, the district court stays all related claims against the vessel owner pending in any other forum and directs all potential claimants to file their claims with the district court within a specified time period. ***In re Muer,*** 146 F.3d 410, 414 (6th Cir. 1998); ***Beiswenger Enterprises,*** 86 F.3d at 1035; ***In re Dammers,*** 836 F.2d at 755.

> Thereafter, in a proceeding known as a *concursus,* the district court, sitting in admiralty without a jury, determines "whether there was negligence; if there was negligence, whether it was without the privity and knowledge of the owner; and if limitation is granted, how the [limitation] fund should be distributed. *Universal Towing [v. Barrale,* 595 F.2d 414, 417 (8th Cir. 1979)]. It is only in this way that the admiralty court can achieve the primary purpose of the act – "to provide a marshalling of assets [and] the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full." *In re Moran Transportation Corp.,* 185 F.2d 386, 389 (2d Cir. 1950) [remaining citations omitted].

In re Dammers, 836 F.2d at 755. *See also* ***In re Complaint of Consolidation Coal Company,*** 123 F.3d 126, 132 (3d Cir. 1997) (a complaint under the Limitation Act follows the following process: The district court, sitting in admiralty without a jury, first determines whether there was negligence; second, if there was negligence, whether it was without the privity and knowledge of the owner; and, finally, if limitation is granted, how the limitation fund should be distributed), *cert. denied* 118 S.Ct. 1380 (1998); ***Beiswenger,*** 86 F.3d at 1036 (the damage claimants bear the initial burden of establishing liability, and the shipowner then bears the burden of establishing the lack of privity or knowledge; if the vessel owner is found liable, but limitation is granted, the admiralty court distributes the limitation fund among the damage claimants in an equitable proceeding known as a concursus).[1]

Federal courts have exclusive admiralty jurisdiction to determine whether a vessel owner is entitled to limited liability. ***In re Muer,*** 146 F.3d at 417; ***Beiswenger,*** 86 F.3d at 1036. In limitation proceedings, as in all admiralty cases, there is no right to a jury trial. ***Beiswenger,*** 86 F.3d at 1037. However, the same statute that grants the federal courts exclusive admiralty jurisdiction saves to suitors "all other remedies to which they are otherwise entitled." ***In re Muer,*** 146 F.3d at 417 (quoting 28 U.S.C. § 1333(1)).

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[1] Title 28 U.S.C. § 1333 provides, in relevant part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

The "saving to suitors" clause preserves common law rights and remedies, including the right to a jury trial, in the forum of the claimant's choice. ***In re Consolidation Coal,*** 123 F.3d at 132; ***Beiswenger,*** 86 F.3d at 1037; ***Odesco Oil and Gas Co v. Bonnette,*** 74 F.3d 671, 674 (5th Cir.), *cert. denied* 117 S.Ct. 79 (1996); ***In re Dammers,*** 836 F.2d at 755. Thus, a tension exists between the exclusive jurisdiction vested in the admiralty courts to determine a vessel owner's right to limited liability and the savings to suitors clause. ***In re Muer,*** 146 F.3d at 417; ***Besiwenger,*** 86 F.3d at 1037; ***Jefferson Barracks Marine Service, Inc. v. Casey,*** 763 F.2d 1007, 1009 (8th cir. 1985).

In an attempt to reconcile the "recurring and inherent conflict" between these two statutory mandates, ***In re Dammers,*** 836 F.3d at 754, courts have created two exceptions to the admiralty court's exclusive jurisdiction over limitation proceedings in which a claimant must be allowed to pursue a claim in the forum of his choice. Under either exception, "[t]he court's primary concern is to protect the shipowner's absolute right to claim the Act's liability cap, and to reserve the adjudication of that right in the federal forum." ***In re Port Arthur Towing Co.,*** 42 F.3d 312, 316 (5th Cir.) (quoting *Magnolia Marine Transp. v. Laplace Towing Corp.,* 964 F.2d 1571, 1575 (5th Cir. 1992)), *cert. denied* 516 U.S. 1995; ***Odesco,*** 74 F.3d at 674 (allowing the state court action to proceed is contingent on protecting the absolute right of the shipowner to limit his or her liability).

The first exception occurs if the value of the limitation fund (value of the vessel plus freight) exceeds the total value of all claims asserted against the vessel owner. In such a case, the vessel owner is not exposed to liability

in excess of the limitation fund and, thus the vessel owner's rights under the Limitation Act are not implicated. ***Beiswenger,*** 86 F.3d at 1037; ***Odesco,*** 74 F.3d at 674; ***Port Arthur,*** 42 F.3d at 316 (when a shipowner is not exposed to potential liability in excess of the value of the vessel and its freight, the shipowner's absolute right to limit its liability is not implicated and the savings to suitors clause dictates that the admiralty court must allow suits pending against the shipowner in a common law forum to proceed); ***Magnolia Marine Transport Co. v. Laplace Towing Corp.,*** 964 F.2d 1571, 1575 (5th Cir. 1992) (the Supreme Court case *Lake Tankers Corp. v. Henn,* makes "crystal clear" that the Act is directed at maritime misfortunes where the losses claimed exceed the value of the vessel and freight; where the claim does not exceed that value, the saving-to-suitors clause dictates that the admiralty court must allow suits pending against the shipowner in a common law forum to proceed); ***S&E Shipping Corp,*** 678 F.2d 636, 643 (6th Cir. 1982) ("Where the limitation fund is sufficient to pay all potential claims . . . a concursus is unnecessary because the claimants need not compete among themselves for larger portions of a limited fund. This exception to the concursus proceeding protects the claimant's right to a jury trial in the forum of his choice without undermining the Limitation Act's policy of limiting the shipowner's liability to the value of the vessel and its freight.").

The second exception occurs when a single claimant brings an action against the shipowner seeking damages in excess of the value of the vessel. Because a major purpose of the concursus proceeding is to resolve competing claims to the limitation fund, the single claimant

may try liability and damages issues in the forum of his choice by filing stipulations that protect the shipowner's right to have the admiralty court ultimately adjudicate its claim to limited liability. ***Beiswenger,*** 86 F.3d at 1037. The Eighth Circuit Court of Appeals has consistently held that, in order to invoke the single claimant exception, a single claimant must make three stipulations: (1) concede that the value of the fund is the value of the vessel and its freight; (2) waive any right to a claim of res judicata based on another court's judgment; and (3) concede the district court's exclusive jurisdiction to rule on all questions pertaining to limitation of liability. ***Jefferson Barracks,*** 763 F.2d at 1010; ***Valley Line,*** 771 F.2d at 372-73.

If either the adequate fund exception or the single claimant exception applies, it is an abuse of discretion for the court to fail to dissolve the injunction against other legal proceedings and thus deprive a claimant of his choice of forum. ***Valley Line,*** 771 F.2d at 373. To require a claimant to proceed in federal court where there is only a single claimant or where the fund is adequate to cover all claims would

> transform [the Limitation of Liability Act] from an instrument protective of a vessel owner's liability to "an offensive weapon by which the shipowner could deprive suitors of their common-law rights." *In re S&E Shipping Corp.,* 678 F.2d at 643 n. 12 (citing *Lake Tankers Corp.,* 354 U.S. at 152-53, 77 S.Ct. 1269). "In view of the explicit mandate from Congress the [claimant] must not be thwarted in her attempt to employ her common-law remedy in the state court

where she may obtain trial by jury." *Lake Tankers Corp.*, 354 U.S. at 152, 77 S.Ct. 1269.

In re Muer, 146 F.3d at 419.[2]

Reviewing the facts of this case, the Court finds that it should dissolve the injunction as requested in Claimant's motion. The court finds that Claimant has clearly met the adequate fund exception. The value of the limitation fund (here, $450,000) exceeds the total value of all claims asserted against the vessel owner (here, $400,000). Thus, Lewis & Clark is not exposed to liability in excess of the limitation fund and its rights under the Limitation Act are not implicated. ***Beiswenger,*** 86 F.3d at 1037; ***Odesco,*** 74 F.3d at 674; ***Magnolia Marine Transport,*** 964 F.2d at 1575; ***S&E Shipping Corp,*** 678 F.2d at 643.

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[2] As an aside, after a district court dissolves the injunction, the following procedures take place. If the state court holds the vessel owner liable for the accident and assesses damages exceeding the limitation fund, the parties must return to the admiralty court for a determination of the privity or knowledge issues. If limitation is denied, because the vessel owner fails to establish a lack of privity or knowledge, the claimant may then enforce his or her state court judgment for damages exceeding the limitation fund. Accordingly, the shipowner's absolute right to claim limited liability and to reserve the adjudication of that claim in the admiralty court, has been fully protected. ***Beisenger,*** 86 F.3d at 1038); ***In re McCarthy Brothers Company/Clark Bridge,*** 83 F.3d 821, 828 (7th Cir.) (If the shipowner either (1) wins in the state court; or (2) loses, but only in an amount less than the value of his ship and its cargo, then the need for further proceedings in federal court is obviated. If the shipowner is found liable for more than the value of his ship and its cargo in the state action, further proceedings in the federal limitation action may be necessary, but only where the claimant contests the limitation), *cert. denied* 117 S.Ct. 361 (1996).

Lewis & Clark argues that, even though Claimant meets the adequate fund exception, the Court should not dissolve the restraining order because Lewis & Clark not only has the right to limit its liability in this proceeding but it also has the right to exoneration from liability in this Court. The Court disagrees.

The purpose of the Limitation Act is *limitation.* The Limitation Act does not mention exoneration and, although Rule F provides a vessel owner with the right to demand exoneration, it does not guarantee "exoneration as a matter of right" nor does it reserve the question exclusively to the federal courts. ***In re Antill,*** 1997 WL 399603 (E.D.La. 1997). "[T]he Act is not one of immunity from liability but of limitation of it and we read no other privilege for the shipowner into its language over and above that granting him limited liability." ***In re Antill,*** 1997 WL 399603 (E.D.La. 1997). Thus, the Court finds that the mere fact Lewis & Clark is seeking exoneration in this cause of action as well as limitation of liability does not hinder this Court's ability to dissolve the injunction.[3]

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[3] The Court also finds that Claimant may meet the single claimant exception. Certainly, there is no dispute that Claimant is a single claimant. The nature of the accident belies the possibility of multiple claims and no other claims were filed in this court after the Court notified potential claimants to do so. Additionally, Lewis & Clark has not made any representations to this Court suggesting the possibility of additional claimants.

Lewis & Clark contends that a claimant's right to a jury trial is the only common law remedy granted to the claimant under the savings to suitor clause. In light of the fact that our Claimant has waived that right in his Madison County state court action, Lewis & Clark argues that tension no longer exists between the Limitation of Liability Act and the savings to suitors clause.

Certain stipulations are required of a claimant before a court can dissolve a restraining order, although the

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Thus, according to Lewis & Clark, Claimant cannot rely upon the single claimant exception for purposes of dissolving the instant injunction.

The Court does not find this issue to be as clear cut as Lewis & Clark would suggest. The express language of the savings to suitors clause saves to suitors "all other remedies to which they are entitled." This language does not expressly state that a right to a jury trial is the *only* remedy saved under the clause. Although some courts have elected to focus the conflict between the savings clause and the Limitation Act on the claimant's right to a jury trial, there is no holding in any Supreme Court case or Circuit Court of Appeals decision providing that a right to a jury trial is the *only* remedy saved to a suitor. For instance, many cases seem to suggest that the savings clause grants to a claimant the right to have his claim tried in a "forum of his choice." *See, e.g.*, ***Odesco Oil,*** 74 F.3d at 675 (although the claimants' interest in litigating in the *forum of their choice* is substantial, we will accede to the choice only if it is accompanied by stipulations fully protecting the vessel owner's right to limit liability); ***In re Antill,*** 1997 WL 399693, *5 ("Given adequate protection of the shipowner's right, a claimant is entitled to proceed *in the forum of his or her choice*, regardless of the judicial inefficiency this decision may cause. As the Court finds that claimant has adequately protected the shipowner's right to limit his liability, the Court must respect claimant's right to proceed *in the forum of his choice*, even if this choice results in an overlap between the federal and state cases").

This Court is hesitant to conclude, without express language in the savings clause or clear guidance by the Supreme Court or the Circuit Courts of Appeals, that the *only* remedy saved to suitors is a right to a jury trial outside the limitation proceeding. Thus, the mere fact that a claimant has waived his right to a jury trial in a state court proceeding would not necessarily render the single claimant exception inapplicable. ***But see In re Eagle Marine Industries, Inc.,*** No. 4:97CV0357 (ERW), Memorandum and Order (October 16, 1997). However,

stipulations appear to be required only in the single claimant case. Nonetheless, assuming they apply to the adequate fund exception as well, the court finds that Claimant has made the necessary stipulations to protect any rights Lewis & Clark may have to a limitation proceeding in this Court. As stated earlier, a single claimant must stipulate to the following: (1) concede that the value of the fund is the value of the vessel and its freight; (2) waive any right to a claim of res judicata based on another court's judgment; and (3) concede the district court's exclusive jurisdiction to rule on all questions pertaining to limitation of liability. ***Jefferson Barracks,*** 763 F.2d at 1010. Lewis & Clark has conceded that Claimant has properly entered the second and third stipulations identified above. However, as noted by Lewis & Clark, Claimant has not meet the first stipulation. Nonetheless, the Court finds this inadequacy is not fatal to Claimant's motion to dissolve because Claimant amended his claim to $400,000, which had the effect of conceding the value of the fund and of limiting the judgment Claimant could seek in a state court proceeding. Therefore, that stipulation is unnecessary in this case. ***Valley Line Company,*** 771 F.2d at 373.[4]

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as stated earlier, in light of the fact that Claimant has met the adequate fund exception, the Court need not reach this issue.

[4] To the extent that Lewis & Clark argues that Claimant's stipulations were unenforceable against Claimant because they were signed only by his attorney, the argument is also without merit. "While it may be the general rule that an attorney has no implied authority to compromise a client's cause of action to the client's prejudice, it is clear that an attorney does have the implied power to take all action with reference to procedural matters. [citation omitted] [Claimant's] attorney filed the

III.

CONCLUSION

In light of the fact that the adequate fund exception applies in this case, it would be an abuse of discretion for this Court to fail to dissolve the injunction against other proceedings and, thus, deprive Claimant of his choice of forum. ***Valley Line,*** 771 F.2d at 373. Therefore, Claimant's motion to dissolve will be granted and he will be permitted to pursue his state court action.

Typically, if the vessel owner either (1) wins in the state court; or (2) loses, but only in an amount less than the value of his ship, then the need for further proceedings in federal court is obviated. ***In re McCarthy Brothers,*** 83 F.3d at 828. Here, Claimant has conceded that his claim is less than the value of the ship. Thus, it does not appear to the Court that there are any circumstances which would warrant the parties returning to this Court following the conclusion of the state court action. Nonetheless, in an abundance of caution, the Court will stay the present proceedings pending the conclusion of the Madison County State Court action and will administratively close this case, subject to re-opening by either party if warranted.

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stipulations in the course of following the procedure which not only maximized his client's claim but also preserved his client's substantive right to a jury trial in the forum of his choosing. There is no doubt that the stipulations are enforceable against [claimant]." ***Valley Line Co.,*** 771 F.2d at 376.

Accordingly,

IT IS HEREBY ORDERED that the motion of Claimant James Franklin Lewis to dissolve restraining order is **GRANTED. [18]**

IT IS FURTHER ORDERED that the restraining order entered by the Court on May 8, 1998, is hereby **DISSOLVED.**

IT IS FURTHER ORDERED that the instant cause of action is **STAYED** pending final resolution of the cause of action filed by Claimant in the Circuit Court of Madison County, State of Illinois, No. 98-L-233.

IT IS FINALLY ORDERED that the Clerk of the Court shall administratively **CLOSE** this file, which shall be subject to reopening on motion of either party as warranted.

/s/ Mary Ann L. Medler
MARY ANN L. MEDLER
UNITED STATES MAGISTRATE
JUDGE

Dated this 22nd day of December, 1998.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

IN THE MATTER OF THE COMPLAINT OF EAGLE MARINE INDUSTRIES, INC., A CORPORATION, AND PARAGON MARINE SERVICES, INC., A CORPORATION, FOR EXONERATION FROM OR LIMITATION OF LIABILITY,	)	Case No. 4:97CV00357 ERW
Petitioners,	)	
Vs.	)	
MADONNA MACKE, as Special, Administratrix of the Estate Of WILLIAM ROBERT MACKE,	)	
Respondent/Claimant.	)	

MEMORANDUM AND ORDER

(Filed Oct. 16, 1997)

This matter is before the Court upon the motions of petitioners for default or for judgment [document #15], and on the motions of respondent to dissolve the restraining order [document #11] and to increase the amount of stipulation or security [document #12].

This is a maritime limitation of liability action brought by Eagle Marine Industries, Inc. (Eagle), and Paragon Marine Services, Inc. (Paragon), pursuant to 46 U.S.C. § 181 et seq. On March 4, 1997, this Court entered an order enjoining the filing or commencement of any

actions against petitioner related to a March 1, 1997 incident involving the M/V MARY BURKE. The stipulation for value approved by the Court on March 4, 1997, establishes the value of the limitation fund as $50,000. All potential claimants were given until September 1, 1997, to file their claims with this Court. Claimant filed her claim on September 2, 1997, and petitioners move for default arguing that it is untimely.

However, September 1, 1997, was Labor Day, which is a legal holiday on which this Court is closed. *See* Fed.R.Civ.P. 6. On September 2, 1997, Madonna Macke, as special administratrix of the estate of Robert Macke, filed claims for damages in excess of $50,000 arising from the incident. Since those claims could not have been filed on a legal holiday, the Court accepts the September 2, 1997 filing as timely. Petitioners' motion for default will be denied.

Petitioners also move for judgment on the basis that claimant's pleading is deficient under Supplemental Rule F(5), Fed.R.Civ.P., for Admiralty and Maritime Claims. Rule F(5) of the Federal Rules of Civil Procedure Supplemental Rules for Admiralty and Maritime Claims provides that

> Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

Petitioners contend that the Claim for Damages for Wrongful Death served and filed on September 2, 1997, fails to satisfy these requirements because it does not list any facts upon which she relies to support her claim. Petitioners seek to dismiss the claim or have judgment entered in their favor, due to the deficiencies of claimant's filing. The Court agrees with claimant that the pleading requirements of Supplemental Rule F(5) are similar to those Fed.R.Civ.P. 8(a). ***See In re Triple Screw Marine Towing, Inc.***, 1994 WL 151101, * (E.D.La. 1994). When a complaint is analyzed under the pleading standards, the allegations should be construed favorably to the pleader, and the claim should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." ***Conley v. Gibson***, 355 U.S. 41, 45-46 (1957). Claimant has stated that her husband was a crew member on the subject vessel, that the vessel was unseaworthy, that her husband died as a result of the negligence of others and the unseaworthiness, and that she is entitled to maintain an action to recover. The Court finds that these allegations are sufficient to state a claim for wrongful death and survivorship benefits, and that these allegations adequately put petitioners on notice of the claims against them. Petitioners' motion for judgment will be denied.

Claimant moves the Court for dissolution of the injunction in order that she may pursue actions for negligence and unseaworthiness in state court. The Limitation of Liability Act confers upon a vessel owner, when loss or damage occurs without the owner's privity or knowledge, the right to limit its liability to the value of its

interest in the vessel and the vessel's pending freight. 46 U.S.C. § 183; ***Valley Line Co. v. Ryan***, 771 F.2d 366, 372-73 (8th Cir. 1985). The vessel owner may seek judgment for exoneration from or limitation of liability and upon filing its complaint and depositing adequate surety for the ship and her freight, the district court must enjoin all actions which relate to the subject of the limitation proceeding and require all persons who have claims to assert them in the limitation action. Rule F, Supplemental Rules for Certain Admiralty and Maritime Claims, Fed.R.Civ.P.; ***Universal Towing Co. v. Barrale***, 595 F.2d 414, 417 (8th Cir. 1979).

There is no right to a jury trial in actions instituted in admiralty, but claims such as those arising under the Jones Act carry with them a right to jury trial. ***Fitzgerald v. United States Lines Co.***, 374 U.S. 16, 20-21 (1963). Although the district court's admiralty jurisdiction is exclusive, the jurisdictional grant expressly "sav[es] to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333; ***Valley Line Co.***, 771 F.2d at 372.

In an attempt to accommodate the shipowner's right to limit its liability in equity without a jury and the claimant's right to a trial by jury for common law and statutory claims, the courts have recognized two exceptions to the district court's exclusive jurisdiction over limitation of liability proceedings. One is when the limitation fund exceeds the aggregate of the claims asserted against it. The other is when there is a single claim. In the single claim situation, the single claimant must concede that the value of the fund is the value of the vessel and its freight, waive any right to a claim of res judicata based on

another court's judgment, and concede the district court's exclusive jurisdiction to rule on all questions pertaining to limitation of liability. *Id.* at 372-73. When only one claim has been filed and "nothing appears to suggest the possibility of any other claim," the district court must dissolve its injunction to permit the single claimant to pursue a separate action and a jury trial. ***Langnes v. Green,*** 282 U.S. 531, 540 (1931); ***Universal Towing Co. v. Barrale,*** 595 F.2d 414, 418-19 (8th Cir. 1979).

In this case, there is something to indicate the presence of another claim. Petitioners have filed evidence that another entity seeks to recover from them for damages sustained in the March 1, 1997, accident. A claim has been submitted directly to petitioners from Peavey Barge Lines, for damages to one if its barges.

Additionally, petitioners note that plaintiff has failed to make a jury demand in both her complaint and amended complaint filed in Illinois State Court. Since plaintiff has not requested a jury trial, there is not a conflict between the shipowner's right to limitation and the claimant's right to a jury trial, and so this Court should not consider dissolving the injunction. ***See Universal Towing Co.,*** 595 F.2d at 417; ***Valley Line Co.,*** 771 F.2d at 372.

Finally, petitioners are correct that plaintiff has failed to include the proper stipulations that are prerequisites to dissolving a restraining order and allowing a claimant to proceed in state court. Claimant's motion to dissolve the restraining order will be denied.

The last matter before this Court is claimant's motion to increase the amount of stipulation or security of the

limitation fund. Claimant disputes the $50,000 amount set by petitioners as the value of the subject vessel and her freight. This amount was determined ex parte, and submitted to the Court without claimant having the ability to contest it. Therefore, the Court will order a hearing on claimant's motion, and require the parties to submit briefs, not in excess of 5 pages, addressing the value of the subject vessel. The briefs shall be due three days prior to the hearing date, and the hearing will only be canceled upon joint notification to the Court that the matter is now moot.

Accordingly,

IT IS HEREBY ORDERED that petitioners' motion for default or for judgment [document #15] is **DENIED.**

IT IS FURTHER ORDERED that claimant's motion to dissolve the restraining order [document #11] is **DENIED.**

IT IS FURTHER ORDERED that claimant's motion to increase the stipulation or security or the limited fund is **SET FOR HEARING** on Friday, October 31, 1997 at 11:00 a.m. The parties shall submit briefs on the issue by October 28, 1997, and petitioner's [sic] shall include appraisals or other valuation documents upon which they rely.

Dated this 16 Day of October, 1997.

/s/ E. Richard Webber
E. RICHARD WEBBER
UNITED STATES DISTRICT JUDGE

1982 AMERICAN MARITIME CASES

IN THE MATTER OF THE COMPLAINT OF S & E SHIPPING CORP., ETC., *Plaintiff*

v.

CHESAPEAKE & OHIO RAILWAY CO., *ET AL.*, *Defendant.*

United States District Court, Northern District of Ohio (Western Division),
August 24, 1982.
No. C 79-150

JURISDICTION – 112. **Concurrent Remedy at Common Law, "Saving Clause" LIMITATION OF SHIPOWNER'S LIABILITY –**

15. Pleading and Practice – PRACTICE – 262. Trial by Jury.

Although the "saving to suitors" clause preserves the right of a claimant to demand a state court jury trial where only a single claim has been filed in a shipowner's limitation proceeding, this right does not exist where the claimant never demanded a jury. In such a case Congress clearly intended that the admiralty court should decide the claim.

Previous proceedings reported at 1982 AMC 2359, 678 F.2d 636.

John H. Hanninen and Gene B. George (Ray, Robinson, Hanninen & Carle) *for Plaintiff S. & E. Shipping Corp.*

Robert M. Anspach (Shumaker, Loop & Kendrick) *for Claimant/Defendant Chesapeake & Ohio Railway Co.*

NICHOLAS J. WALINSKI, D.J.:

This cause came before the Court on the motion by claimant Chesapeake & Ohio Railway Company (C & O) to modify an injunction issued by this Court on March 14, 1979. Also pending is a similar motion by claimants Lawrence and Karoline Myhre, but this latter motion is moot, the movants having been dismissed by order of the Court on July 7, 1982 pursuant to a settlement entered into between the shipowner and the Myhres. The action is one at admiralty instituted by the S & E Corporation, as owner of the steamer *Henry Steinbrenner*, for exoneration from of limitation of liability arising out of an accident on April 27, 1978. 46 U.S.C. sec. 181 *et seq.*

I.

On April 27, 1978, the *Henry Steinbrenner* was moored outboard of the steamer *Charles C. West*. Both vessels were moored in a slip on the western side of a dock owned by the Toledo-Lucas County Port Authority and leased to the Chessie System. On the property, the railroad operated a docking facility.

Since April 18, 1978, the *Steinbrenner* had been undergoing her spring fitout. On the day of April 27, 1978, the *Steinbrenner* was fully manned with officers and seamen, all of whom were under Shipping Articles, including Lawrence O. Myhre. Myhre was an experienced seaman who began sailing in 1963 and obtained his license in 1974.

Myhre went ashore to call his wife on the evening of April 27, 1978, there being no telephone aboard the *Steinbrenner*. To reach the phone, Myhre had to cross railroad tracks on the dock property operated by C. & O. While

crossing the track he heard an oncoming railroad car. He attempted to get off the track but his foot became caught. The oncoming car severed two of his legs.

On February 9, 1979, Mr. Myhre and his wife, Karoline, brought a civil action in the Lucas County Court of Common Pleas against three defendants: Toledo-Lucas County Port Authority, C & O, and S & E Shipping Corporation. The claims against the Port Authority and the railroad are nonmaritime, premised solely on state statutory and common law. The claims against S & E Shipping Corporation are maritime. Mrs. Myhre seeks to recover for the loss of her husband's society, comfort and consortium under the general maritime law.

S & E Shipping Corporation filed the instant action in admiralty for exoneration from or limitation of liability. This Court issued a monition to all claimants to present their claims within a fixed time and the usual order restraining further proceedings against the shipowner in the state court pursuant to 46 U.S.C. sec. 185; Rules F(3) and (4), Supplemental Rule for Certain Admiralty and Maritime Clams [sic].

On May 23, 1980, this Court modified the injunction on motion of the claimants, allowing the state court to proceed on the issues of liability and damages with the federal court staying its proceeding to limit liability. Upon appeal to the Sixth Circuit, this order modifying the injunction was reversed, 1982 AMC 2359, 678 F.2d 636.

This Court has also approved a settlement of the claim of claimants Lawrence and Karoline Myhre who have or will dismiss their state court suit pursuant to that settlement. In the instant motion, the claimant C & O asks

this Court to modify its injunction so that it may proceed with its state court claims against the shipowner.

II.

The shipowner in the present case is entitled to petition in admiralty for exoneration from or limitation of liability. Upon proper filing of the petition, "all claims and proceedings against the owner with respect to the matter in question shall cease." 46 U.S.C. sec. 185. The claimants are required to make proof of their claims and to litigate their rights at admiralty, and may also, as C & O has done, contest the right of the shipowner to a limitation of liability as to some or all of the claims.

The plain language of 46 U.S.C. sec. 1985 appears to give the shipowner an absolute right to localize proceedings, in admiralty by petition for limitation. Notwithstanding this, the original, exclusive jurisdiction of the district court is modified by 28 U.S.C. sec. 1333 which grants jurisdiction, but also provides for the "saving to suitors in all cases all other remedies to which they are otherwise entitled."

A tension exists between the two provisions where allowing the shipowner to force the claimants to litigate their claim in admiralty deprives the claimants of the jury trial they could have in their common law action. This conflict has arisen numerous times and the body of law which has emerged is carefully set out in the opinion of the Sixth Circuit reversing this Court's earlier order modifying the injunction in this case. *In the Matter of S & E Shipping Corp.*, 1982 AMC 2359, 678 F.2d 636 (6 Cir. 1982). Without reiterating what has already been said on this

issue in this case as well as in the literature, the issue involves adjusting conflicting policies.

The Limitation Act serves the obvious purpose of limiting the liability of shipowners, and also protecting the shipowner from the risk of inconsistent judgment arising from a multiplicity of actions, and enabling the admiralty court to equitably distribute a limited fund among a number of claimants. *Maryland Casualty Co. v. Cushing*, 347 U.S. 409, 1954 AMC 837 (1954); See also, *Providence & New York Steamship Co. v. Hill Manufacturing Co.*, 109 U.S. 578 (1883). The historical context of the Act is also instructive. The Act was designed to foster the growth of the shipping industry.

Only where there is a savings clause issue have courts deviated from the statutory scheme and allowed claimants to proceed outside admiralty. Thus, where the claimant's right to a jury trial of his common law claims is at stake, two lines of cases have evolved where the issues of liability and damages are tried in state courts. One is where the claims are for less than the limitation fund or are made so by stipulation. E.g., *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 1957 AMC 1165 (1957). In such a case the "saving to suitors" clause may be served without risk of violence to the shipowner's right to limited liability. The other instance is where there is a single claimant who by stipulation preserves the issues of the limits of liability to the admiralty court. E.g., *Langnes v. Green*, 282 U.S. 531, 1931 AMC 511 (1931).

What is significant in *Henn* and *Langnes* is not the fact that the fund was adequate nor that there was but a single claim. Rather, what is of import is that in both

cases there was a demonstrable issue of the claimants' rights under the saving to suitors clause, the right to trial by jury. The factual contexts simply provide an opportunity to accommodate the suitors' rights to a jury with the demands of the Limitation Act.

In the instant case, the claimant never demanded a jury on the issues raised in its cross claim against S & E. The claimant does not assert any other remedy it is denied by the matter being determined in the admiralty court, nor does one come to mind. Accordingly, the cases of *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 1957 AMC 1165 (1957), *Langnes v. Green*, 282 U.S. 531, 1931 AMC 511 (1931) and their progeny are inapposite.

In the absence of such a claim, the congressional policy to have the matter determined in a single forum is clear.

Accordingly, it is

Ordered that the Myhres' motion to modify is denied as moot.

It is further ordered that the claimant's motion to modify the March 14, 1979 injunction is denied.

In the Matter of SUARD BARGE SERVICE, INC., as Owner of the Spud Barge Suard 45, Petitioning for Exoneration from Damages or Limitation of Liability.

Civ.A. No. 96-3185.

United States District Court, E.D. Louisiana.

March 6, 1997.

ORDER AND REASONS

VANCE, District Judge.

Before the Court are two motions of claimant, Tina Kay Windham, individually and as conservator of William Jeffrey Windham, and as natural tutrix of their minor children, Jeffrey Shane Windham and Jonathan Jay Windham: (1) a motion to lift the stay and restraining order issued on October 1, 1996, pertaining to the limitation proceeding of Suard Barge Service, Inc.; and (2) a motion to lift the order issued November 18, 1996 approving security, directing issuance of notice, and restraining the prosecution of claims, pending the limitation proceeding of Hopson Transportation, Inc. The Court heard oral argument in this matter on Wednesday, February 19, 1997. By oral motion before the Court, claimant Tina Kay Windham, individually and in her representative capacity, also requested that the Court lift the stay ordered in the limitation proceeding of Caillou Island Towing, Inc., which was recently consolidated with the related proceedings pending in this Court. For the following reasons, the motions are DENIED.

I. BACKGROUND

This action arises out of an accident involving William Jeffrey Windham. On or about July 2, 1996, Windham, an employee of Camco Coil Tubing Services ("Camco"), sustained injury to his head while working aboard spud barge SUARD 45, which was owned by Suard Barge Service, Inc. ("Suard") and chartered to Caillou Island Towing Co., Inc. ("Caillou Island Towing").[1] At the time of the accident, the barge was in the tow of the M/V MR. LANCE, which was owned by Hopson Transportation, Inc. ("Hopson"). Captain Wilber Sons was operating the spud pulling unit on the barge when the accident occurred.

On August 26, 1996, Windham's wife, Tina Kay Windham, individually and as conservator of William Jeffrey Windham, and as natural tutrix of their minor children, Jeffrey Shane Windham and Jonathan Jay Windham, filed a petition for damages in Terrebonne Parish state court against Suard, Hopson, Caillou Island Towing, Camco, and Captain Wilber Sons. In turn, Hopson filed a cross-claim against Suard for indemnity and/or contribution.

One month later, Suard filed a petition for exoneration from and/or limitation of liability under the Limitation of Liability Act, 46 U.S.C. §§ 181-189, in district court

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[1] Allegedly, Windham was in the process of removing the spud pin from the starboard spud on the barge when the spud suddenly jerked downward. The unexpected jolt caused the still partially-inserted pin to pivot downward on one end and upward on the other, thereby striking Windham in the head.

in the Eastern District of Louisiana. By order dated October 1, 1996, Judge Thomas Porteous, Jr. directed that all claims against the limitation fund be filed on or before December 2, 1996.[2] Rec. Doc. Nos. 2, 7. Judge Porteous also ordered that the "further prosecution of any action or proceeding against petitioner. . . . with respect to any claim for which petitioner seeks exoneration from or limitation of liability . . . is hereby stayed and restrained until the . . . determination of this proceeding." *Id.*

Mrs. Windham, individually and in her representative capacity, filed an answer and claim against Suard, and then moved to lift the stay and restraining order issued on October 1, 1996, on the ground that her signed stipulation adequately protects Suard's exoneration and limitation rights. Thus, Mrs. Windham asserted that the stay should be lifted under the "single claimant" exception.

Thereafter, Hopson filed an answer and claim for indemnity and/or contribution against Suard. Rec. Doc. No. 12. In addition, Camco, Caillou Island Towing, and Captain Sons each filed an answer and claim against Suard. Rec. Doc. Nos. 15, 16, 22, 23, 37.

Hopson also filed a petition for exoneration from and/or limitation of liability under the Limitation Act, which was consolidated with the Suard limitation proceeding before this Court. At Hopson's request, an order approving security, directing issuance of notice, and

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[2] The case was transferred to this Court by order dated November 8, 1996. Rec. Doc. No. 17.

restraining prosecution of claims was granted on November 18, 1996. Camco, Caillou Towing, and Mrs. Windham, individually and in her representative capacity, have each filed an answer and claim against Hopson.

Mrs. Windham has filed a motion to lift the order issued in November in the Hopson limitation proceeding restraining the prosecution of claims. Again, Mrs. Windham asserts that as the single claimant in the proceeding, she may prosecute her state court claim.

Suard, Hopson, Camco, Caillou Island Towing, and Captain Sons have all opposed Mrs. Windham's motions on the grounds that all claimants have not entered the appropriate stipulations and Mrs. Windham's proposed stipulation is insufficient under the law.

II. Legal Analysis

The Limitation of Liability Act, 46 U.S.C. §§ 181-189, provides, in pertinent part, that:

> The liability of the owner of any vessel, whether American or foreign, for any . . . loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her fright then pending.

46 U.S.C. App. § 183(a). The Act further provides that:

> The vessel owner, within six months after a claimant shall have given to or filed with such

> owner written notice of claim, may petition a district court of the United States of competent jurisdiction for limitation of liability within the provisions of this chapter. . . .
>
> 46 U.S.C. App. § 185.

This statutory right of a vessel owner to seek a limitation of liability in federal court directly conflicts with the right of a complainant to seek a common law remedy in state court, pursuant to the saving to suitors clause. The savings to suitors clause, as set forth in 28 U.S.C. § 1333(1), provides that:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
> 28 U.S.C. § 1333.

In attempting to resolve the conflict, the Fifth Circuit has held that when a shipowner is not exposed to liability beyond the limitation funds, the savings to suitor clause controls. Complaint of *Port Arthur Towing M/V MISS CAROLYN*, 42 F. 3d 312, 316 (5th Cir. 1995), cert. den., 116 S.Ct. 83 (1995). Thus, with the proper stipulations, the Circuit Court has permitted claimants to proceed outside the limitation action. *See, e.g., Texaco, Inc. v. Williams*, 47 F. 3d 765, 768-69 (5th Cir. 1995), cert. den., 116 S. Ct. 275 (1995), *Odeco Oil and Gas Company, Drilling Division v. Bonnette*, 4 F.3d 401, 404 (5th Cir. 1993), cert. denied, 114 S.Ct. 1370 (1994) (*"Odeco I"*) (if stipulations fully protect ship owner's right to limit liability, courts should allow multiple claimants to go to state court); *Magnolia Marine Transport v. Laplace Towing Corp.*, 964 F.2d 1571, 1576 (5th Cir. 1992) (with proper stipulations, claimant should be allowed to proceed in state court).

This Court has previously addressed the requirements for such stipulations in In the Matter of *Falcon Drilling Company, Inc.*, Civ. Action No. 94-3280, 1996 WL 363445 (E.D.La. Jun. 28, 1996). To properly protect a vessel owner's rights under the Limitation Act, a claimant must stipulate to waiving any claim of res judicata on issues relevant to limitation of liability and/or exoneration in both federal and state court. *Id.* at *1. Also by stipulation, the claimant must agree not to enforce any judgments pending adjudication of the limitation proceeding. *Id.* Additionally, the law is well settled that in a multiple claimant/inadequate fund case, all claimants must sign the stipulation. *Id. See also, Odeco Oil and Gas Company, Drilling Division v. Bonnette*, 74 F. 3d 671, 673 n.4 (5th Cir.), pet. for cert. filed, 65 USLW 3001 (June 18, 1996) (*"Odeco II"*); In the Matter of *Tidewater, Inc.*, 938 F. Supp. 375, 378 (E.D. La. 1996). Claimants seeking indemnity and contribution, as well as claimants seeking costs and attorney's fees must also enter into the stipulation to protect the shipowner's right to limitation. *Odeco II*, 74 F. 3d at 675. The Fifth Circuit has observed that merely giving third parties priority in their claims is inadequate. *Id.*

In this case, the claimants, Suard, Hopson, Caillou Island Towing, and Captain Sons, have not entered into the necessary stipulation. They first opposed Mrs. Windham's motions on the grounds that Mrs. Windham erroneously represented that there was only one claimant and offered an inadequate stipulation under the law. Mrs. Windham has since revised the stipulation.

Suard now alleges that as worded, the revised stipulation fails to protect its right to exoneration. Suard contends that the agreement "to waive any claim of res judicata relevant to the issue of exoneration" merely precludes relitigation of a claim, but not an issue. Suard expresses concern that a state court determination on the issue of liability would effectively deprive it of the right to try the exoneration issues in the federal court proceeding.

The language in the stipulation agreeing "to waive any claim of res judicata relevant to the issue of exoneration" clearly provides that the claimant waives any right to challenge the relitigation of those issues pertaining to exoneration. Thus, the Court is satisfied that the stipulation on this issue is adequate as worded.

The claimants, Suard, Hopson, and Caillou Island Towing, additionally oppose the lifting of the respective stays on the ground that all claimants have not entered the stipulation and that the potential claims for costs alone could exhaust the available limitation fund in contravention of Fifth Circuit authority in *Odeco II*.[3] Mrs. Windham attempts to distinguish the *Odeco II* decision from this matter, stating that the *Odeco II* case involved a contract claim for indemnity and contribution, rather than the purely tort claims at issue in this case. Mrs. Windham further asserts that there is no tort right to indemnity or contribution until a defendant has paid the

[3] Suard has indicated that it has a limitation fund of approximately $85,000. Because this case involves a death, Suard contends that the associated costs could easily exceed the limitation fund.

plaintiff. The Court need not reach this argument, however, because claimant *Caillou Island Towing* has responded that it intends to assert a contractual claim against Hopson.

Moreover, the exposure of Suard, Hopson, and Caillou Island Towing for costs in excess of the limitation fund indicates that their rights of exoneration and/or limitation are not adequately protected if all claimants do not enter the stipulation. Since that has not occurred, the Court cannot lift those orders restraining the prosecution of Mrs. Windham's state action.

Accordingly;

The motions of claimants, Tina Kay Windham, individually and as conservator of William Jeffrey Windham, and as natural tutrix of their minor children, Jeffrey Shane Windham and Jonathan Jay Windham, are hereby DENIED.

In the Matter of FALCON DRILLING COMPANY, INC.
Petition for Exoneration from
or
Limitation of Liability.

Civil Action No. 94-3280.

United States District Court, E.D. Louisiana.

June 28, 1996.

ORDER DENYING CLAIMANTS' MOTION TO LIFT STAY OF OTHER LITIGATION AND TO ADMINISTRATIVELY STAY THE EXONERATION FROM OR LIMITATION OF LIABILITY ACTION

VANCE, District Judge.

This matter is before the Court on the joint motion of claimants, Dorothy Rambo; Sandra Rambo; Donnika M. Rambo; Reginald J. Rambo; the Estate of Roy L. Rambo; and James R. Stewart, to reconsider the Court's May 9, 1996 order denying claimants' Motion to Lift Stay of Other Litigation. Because claimants' motion is based on an entirely new stipulation modified to address the concerns the Court raised in its previously issued order, the Court will not treat claimants' motion as one to alter or amend the judgment under Fed.R.Civ.P. 59(e). Instead, the Court will characterize it as claimants' second Motion to Lift Stay of Other Litigation and to Administratively Stay the Exoneration From or Limitation of Liability Action. However, for the reason stated below, the Court must DENY claimants' motion.

DISCUSSION

In rejecting claimants' previous stipulation, the Court cited two deficiencies: (1) it did not take into account that

Falcon's action was one for exoneration as well as limitation of liability and (2) it did not address claims from potential co-defendants seeking indemnification and contribution against Falcon. (Court's Order at 4.)

First, claimants failed to acknowledge that this was also an action for exoneration. Claimants stipulated that they would waive any claim of res judicata on issues relevant to limitation of liability, but failed to make the same concession for the exoneration action. Moreover, claimants were free to collect a judgment of up to $107,750, the current value of the limitation fund. As a result, Falcon could be exonerated in the current action, but may have already paid out a judgment in excess of $100,000 in a state court judgment. The Court held that this intruded on the exclusive jurisdiction of the federal admiralty courts. (Court's Order at 5.)

In their modified stipulation, the claimants have addressed these concerns by expressly waiving any res judicata claims relevant to the issue of exoneration and agreeing not to enforce any judgments pending the adjudication of this limitation action:

2.

Claimants herein will not seek in any other suit, any judgment(s) or ruling(s) on the issue of Falcon's right of exoneration from and limitation of liability; and hereby consent to waive any claim of res judicata relevant to the issue of exoneration from and limitation of liability based on any judgment(s) that may be rendered in any state court action.

3.

Claimants herein, while not stipulating to or agreeing to $107,750.00 as the value of Falcon's interest in the vessel Falcon Rig. No. 29 and her pending freight and/or the value of Falcon's interest in standby barges made up of ton the Falcon Rig No. 29 and their pending freight, which claimants believe form a flotilla along with the Falcon Rig No. 29 and should therefore be included in the limitation fund, hereby stipulate that this Court has exclusive jurisdiction to determine the proper value of the limitation fund and that in the event there is/are judgment(s) in any state court action against Falcon, or any other party or parties who may make cross-claims or claims over against Falcon, in no event will claimants herein, separately or together, seek to execute or enforce any judgment(s) pending the adjudication of the Complaint in this Court.

Second Modified Joint Stipulation of Claimants at ¶¶ 2-3 (emphasis added).

The Court's second concern focused on the possibility of potential claimants who were not parties to the stipulation. The Fifth Circuit has held that simply giving parties seeking contribution or indemnity priority over the claims of the claimants was inadequate; all parties must sign the stipulation. *Odeco Oil and Gas Co., Drilling Division v. Bonnette*, 74 F.3d 671, 673 n. 4, 675 (5th Cir.1996) (*"Odeco II"*). However, neither Falcon nor the claimants has presented any evidence that any potential claimants exist. Therefore, the Court finds that the stipulation has been signed by all the claimants as required by the Limitation Act. *Id.* at 675.

Although claimants have satisfied all the concerns raised by the Court in its previous order, Falcon advances two new arguments against lifting the Court's stay of other litigation: (1) the modified stipulation may lead to multiple claims in multiple courts and (2) the modified stipulation does not protect it from a common law claim in federal court. The Court addresses each in turn.

First, Falcon argues that claimants' stipulation does not protect them from multiple claims in multiple courts. According to Falcon, this is in violation of the Limitation of Liability Act. (Falcon's Opp. at 2-3). To support its contention, Falcon cites a ten year old Ninth Circuit case that outlines the problems that could arise from approving a stipulation with multiple claimants. *In re Paradise Holdings, Inc.*, 795 F.2d 756, 761-62 (9th Cir.1986), cert. denied, 479 U.S. 1008 (1986). While one Fifth Circuit panel has expressed reservations about the "correctness of condoning a multiplicity of lawsuits," it conceded that it must follow Fifth Circuit law and allow multiple claimants to proceed upon a proper stipulation. *Texaco, Inc. v. Williams*, 47 F.3d 765, 768-69 (5th Cir.1995), cert. denied, 116 S.Ct. 275 (1995).[1] The Court is therefore bound by the

[1] The Texaco court cited the following as the cases which bound its decision: Complaint of *Port Arthur Towing M/V MISS CAROLYN*, 42 F.3d 312, 316 (5th Cir.1995), cert. denied, 116 S.Ct. 83 (1995) (stating that when the shipowner is not exposed to liability beyond the limitation fund the savings to suitors clause controls); *Odeco Oil and Gas Co., Drilling Division v. Bonnette*, 4 F.3d 401, 404-05 (5th Cir.1993), cert. denied, 114 S.Ct. 1370 (1993) (*"Odeco I"*) (if stipulations fully protect ship owner's right to limit liability, courts should allow multiple claimants to go to state court); *Magnolia Marine*, 964 F.2d at 1576 (with proper stipulations, claimants should be allowed to proceed in state court).

Fifth Circuit's pronouncement on the issue, and will allow claimants to proceed so long as Falcon is adequately protected.

Falcon's second argument is that the stipulation is inadequate. While claimants have agreed not to execute any judgments from state courts, they are still free to prosecute an independent action in another federal court. Although claimants have indicated a preference for a state court action, the Court concedes that it is possible under the modified stipulation for claimants to bring their common law claims in federal court without restriction. The Court notes that claimants have already agreed to rectify this problem by further modifying the stipulation to reflect that they will not seek a judgment or ruling in any other suit, state or federal. However, because the stipulation before the Court does not reflect that change, the Court is forced to deny claimants' motion.

CONCLUSION

In preparing their modified stipulation, the claimants have satisfied the concerns the Court expressed in its prior order. In addition, the Court finds no merit in Falcon's contention that stipulations should not be given in a multiple claimant case. The Fifth Circuit has held that with the proper stipulation, district courts must allow claimants to proceed to state court. However, the Court finds that the modified stipulation is inadequate. Claimants have failed to include federal, as well as state courts in their waiver language in paragraphs 2-3 of the modified Stipulation. If claimants submit an additional stipulation that (1) waives any res judicata claims relevant to

the limitation action that stem from a federal court judgment and (2) delays enforcement of any federal court judgments until the limitation action is completed, the Court finds that Falcon's rights under the Limitation of Liability Act will be adequately protected. Accordingly,

IT IS ORDERED that claimants' motion is hereby DENIED.

IT IS FURTHER ORDERED that claimants submit to the Court a modified stipulation that addresses the deficiencies discussed herein within five days of entry of this Order.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1346

IN THE MATTER OF THE COMPLAINT
OF LEWIS & CLARK MARINE, INC.

Appellant,

v.

JAMES F. LEWIS

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 4:98CV0503 (MLM)
The Honorable Marry Ann L. Medler,
U.S. Magistrate Judge

BRIEF OF APPELLEE

THE LAKIN LAW FIRM, P.C.
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Attorney for Appellee,
James F. Lewis

SUMMARY OF CASE AND REQUEST FOR ORAL ARGUMENT

Because claimant deems petitioner's Summary of the Case incomplete under 8th Cir. R. 28A(F)(1), he files this Summary of the Case.

Petitioner filed a complaint pursuant to the limitation of liability statute (46 U.S.C. §181, *et seq.*) in the United States District Court for the Eastern District of Missouri and obtained as a matter of course an injunction prohibiting petitioner from pursuing his Jones Act (46 U.S.C. §688) case in state court. Appellee sought to dissolve the injunction under the "single-claimant" exception to exclusive federal jurisdiction and filed appropriate stipulations toward that end. Appellee filed an additional stipulation which admitted that the value of his claim was less than the value of the petitioner's interest in the vessel and invoked the "adequate fund" exception. Because the vessel owner had received the relief to which it would be entitled by a successful trial, *i.e.*, limited liability, the vessel owner's right to seek limitation of liability was no longer implicated by petitioner's claim. The district court properly dissolved the injunction prohibiting appellee's state court litigation because petitioner had no federally protected interest on which to base such an injunction. Appellee respectfully requests twenty minutes for argument because the claim that exoneration survives the petitioner's right to seek limitation is of first impression at the circuit level.

CORPORATE DISCLOSURE STATEMENT

Appellee states that he is an individual with no entity connections within the meaning of FRAP 26.1.

[Table Of Contents And Authorities Omitted In Printing]

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the District Court in this maritime case properly exercised its discretion in dissolving the stay against claimant's state court litigation when the limitation statute was no longer applicable to the claim?

Lake Tankers Corp. v. Henn, 354 U.S. 147, 150, 1 L.Ed.2d 1246, 77 S.Ct. 1269 (1957)

Curtis Bay Towing Co. v. Tug Kevin Moran, Inc., 159 F.2d 273 (2nd Cir.1947)

Jefferson Barracks Marine Service, Inc. v. Casey, 763 F.2d 1007, 1009 (8th Cir. 1985)

Petition of Moran Transportation Corp., 185 F.2d 386, 388-389 (2nd Cir.1950)

28 U.S.C. §1333(1)

46 U.S.C. §§ 183 and 184

II. Whether claimant's stipulation that his claim is less than the limitation fund adequately protected petitioner when claimant did not challenge the adequacy of the fund and did not consent to the district court retaining issues concerning exoneration?

Newton v. Shipman, 718 F.2d 959 (9th Cir.1983)

Fecht v. Makowski, 406 F.2d 721, 723 (5th Cir.1969)

Jefferson Barracks Marine Service, Inc. v. Casey, 763 F.2d 1007, 1009 (8th Cir. 1985)

Petition of Moran Transportation Corp., 185 F.2d 386, 388-389 (2nd Cir.1950)

28 U.S.C. §2072(b)

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Eastern District of Missouri which dissolved an injunction in this admiralty proceeding for limitation of liability.

The claimant, James Lewis, moved to dissolve the injunction against state court proceedings. Two sets of stipulations supported the motion to dissolve. The first set invoked the "single claimant" exception to exclusive federal jurisdiction. The second invoked the "adequate fund" exception.

On December 22, 1998, the district court entered an order dissolving the injunction. This appeal followed.

STATEMENT OF FACTS

Because petitioner's Brief includes references to matters *dehors* the record and contains no citation to the record on appeal, petitioner's statement of facts is unsatisfactory within the meaning of Rule 28(b), FRAP. The following is therefore offered.

Petitioner filed its Complaint for Exoneration from or Limitation of Liability (the "complaint") in the United States District Court for the Eastern District of Missouri

on March 24, 1998. (Complaint, Tab A, A1[1], *et seq.*) That complaint alleged that just one week earlier, claimant James Lewis while working as a deckhand aboard the M/V KAREN MICHELLE on or about March 17, 1998, "was injured when he purportedly tripped over a wire and injured his back." Complaint, Tab A, A2, par.6. The complaint invoked the Limitation of Liability Act, 46 U.S.C. §§181, *et seq.* (Complaint, Tab A, A3, par.9.)

Petitioner attached to the complaint an affidavit of value from a marine surveyor attesting that the value of the KAREN MICHELLE on March 17, 1998, was $450,000. (Affidavit of Value, Tab B, A8.) Petitioner also filed security for value in the amount of $450,000 (Tab C, A9), and moved for an order approving the security for value. (Motion For Order Approving Stipulation For Costs and Security For Value, *etc.*, Tab F, A17.) That motion was granted and the stipulation for value approved on May 8, 1998. (Order Approving Stipulation, Tab G, A19.) That order also set a claim deadline of June 12, 1998. (Tab G, A20.) The record does not reflect why the Notice of the Complaint was not filed until May 11, 1998.

Notice of the limitation proceeding was not issued for seven weeks after filing. (Notice of Complaint, Tab E, A15.) Unaware of the pending limitation proceeding (see Claimant's Motion to Dissolve, Tab N, A52, par.3), claimant filed his complaint in the Circuit Court of Madison

[1] References to the record are to pages of the Joint Appendix by alphabetical Tab reference and appendix page.

County, Illinois[2] on April 2, 1998. (Tab I, A30, *et seq.*) Petitioner's initial response was to move to transfer the cause for improper venue. (Tab H, A22.) However, when it became apparent that the limitation case had been filed seven weeks before notice was issued[3], the motion to transfer was withdrawn. (Tab K, A43.)

Claimant initially contested petitioner's right to limitation (Answer To Complaint, Tab L, A45, *et seq.*), and filed a claim in excess of the limitation fund. (Tab M, A48.) Petitioner also moved to dissolve the restraining order (Tab N, A51, *et seq.*) and stipulated that:

1. He waives any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in state court (Tab N, A52, par. 8);

2. Stipulates to petitioner's right to litigate issues relating to the limitation in the limitation proceeding; (Tab N, A52, par. 8);

He was the sole claimant. (Tab N, A52, par. 6).

Petitioner objected to this motion on the basis that claimant had not demanded a jury trial in the state court action. (Tab Q, A59, *et seq.*) Claimant responded with a

[2] Petitioner snidely charges claimant with "forum shopping" at various points in its brief, yet never explains why a corporation with its principal place of business in Madison County, Illinois (see Petitioner's Brief at p. 5) would sue a Madison County, Illinois resident (claimant) in a Missouri federal court. The short answer is, of course, because it can. But claimant's exercise of his rights under the saving to suitors clause hardly constitutes improper "forum shopping."

[3] Nor has petitioner explained why it apparently sat on the limitation case without notice or service until after Lewis had filed his lawsuit in Illinois.

second stipulation that the value of his claim was "less than $400,000.00, and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc." (Tab R, A79.) Claimant also filed a reply memorandum in which he argued that the stipulation that his claim does not exceed the limitation fund "removes any federal interest in retaining jurisdiction because the end of the exercise of federal jurisdiction – limitation of liability – has already been met." (Tab R, A77.)

The district court agreed with this analysis and, on December 22, 1998, entered an order dissolving the injunction against state court litigation. (Tab U, Memorandum and Order, A87, *et seq.*) Petitioner timely filed its notice of appeal on January 21, 1999.

Claimant does not dispute petitioner's right to limit its liability in this matter to the value of the limitation fund of $450,000. Claimant does not dispute that $450,000 is sufficient for the value of the vessel. There is only one claimant in this matter.

SUMMARY OF ARGUMENT

The district court properly dissolved the injunction in this single claim-adequate fund case because claimant stipulated to all of the relief which the limitation proceeding could afford: a determination that the value of petitioner's interest in the vessel exceeded the value of the claim. The vessel owner's right to limit its liability is therefore not implicated because the owner's potential liability does not exceed the value of the vessel and its pending freight. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150, 1 L.Ed.2d 1246, 77 S.Ct. 1269 (1957); *Complaint of Port*

Arthur Towing Co., 42 F.3d 312 (5th Cir.1995); see *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1009 (8th Cir. 1985).

The Limitation of Liability Act is applicable only when the limitation fund is insufficient to pay the claims against it. *Petition of Moran Transportation Corp.*, 185 F.2d 386, 388-389 (2nd Cir.1950); 46 U.S.C. §§ 183,184. Because the limitation fund exceeds the value of the claim in this matter, the Act creates no federally protected interest militating against the claimant's interest in proceeding in state court.

That interest of the claimant is, however, squarely within the protection of the saving to suitors clause of 28 U.S.C. §1333(1). Once the petitioner's federal interest was protected, the district court was required to decline jurisdiction under the abstention doctrine established in *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150, 1 L.Ed.2d 1246, 77 S.Ct. 1269 (1957). This is true whether or not the claimant seeks a jury trial in state court. *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2nd Cir.1947).

The saving to suitors clause of 28 U.S.C. §1333(1) includes state court actions which do not seek jury trials. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 68 L.Ed. 582, 44 S.Ct. 474 (1924); *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1486-1487 (5th Cir.1992). Moreover, careful analysis of the policies behind the *Lake Tankers* doctrine militates strongly against creating an exception to abstention in this single-claimant case where the claim is less than the value of the vessel and freight.

The claimant's stipulations adequately protected petitioner's right to limitation. This circuit has previously

determined that such stipulations need not be signed by the claimant personally and that an attorney's signature is sufficient. *Valley Line Co. v. Ryan*, 771 F.2d 366, 376 (8th Cir.1985). Those stipulations were in substantial compliance with legal requirements and any technical deficiency may be cured by appropriate amendment. *Newton v. Shipman*, 718 F.2d 959 (9th Cir.1983).

The district court did not err in refusing to condition dissolution of the injunction on the claimant's agreement to litigate issues of exoneration in the district court. Petitioner has no independent right to exoneration because the exoneration procedure afforded by Supplemental Admiralty Rule F(2) is a procedural adjunct to the determination of a vessel owner's right to limit its liability pursuant to the limitation statute. *Fecht v. Makowski*, 406 F.2d 721, 723 (5th Cir.1969). Where there is no question concerning the vessel owner's right to limit its liability, there is no occasion to determine the exoneration issues in federal court. **Id.** A construction of Supplemental Admiralty Rule F(2) which permits exoneration in the absence of a legitimate question concerning limitation violates the Rules Enabling Act, 28 U.S.C. §2072(b), because the procedural rule would impermissibly enlarge, abridge or modify substantive rights. *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1011 (8th Cir.1985).

The District Court did not abuse its discretion in dissolving the injunction and that order should be affirmed.

ARGUMENT

I. THE INJUNCTION WAS PROPERLY DISSOLVED SINCE PETITIONER'S FEDERAL INTERESTS WERE PROTECTED AND THE SAVING TO SUITORS CLAUSE GUARANTEES A STATE FORUM

A. Standard of Review

The standard of review applicable to this case is abuse of discretion. *In the matter of Helena Marine Service, Inc.*, 564 F.2d 15 (8th Cir. 1977). "[A] refusal to dissolve the stay is usually an abuse of discretion in a clear single-claimant case." *Helena Marine Service, Inc.*, 564 F.2d 15, 18. "In the case of either a single claim or of multiple claims that do not exceed the limitation fund, however, the court's discretion is narrowly circumscribed. The District Court must dissolve the injunction unless the owner can demonstrate that his right to limit liability would be prejudiced." *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir. 1979); see also *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1011 (8th Cir.1985); *accord The Helen L*, 109 F.2d 884, 886 (9th Cir.1940).

B. PETITIONER HAS NO RIGHT TO SEEK LIMITATION IN AN ADEQUATE FUND CASE

The Limitation of Liability Act provides in pertinent part that "The liability of the owner of a vessel * * * for any loss * * * incurred, without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." 46 U.S.C. §183.

Once claimant stipulated that the value of his claim was less than the value of the vessel and freight (Appendix Tab R, A79), the petitioner's claim for limited liability was no longer implicated and the district court properly dissolved the stay. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150, 1 L.Ed.2d 1246, 77 S.Ct. 1269 (1957); *Complaint of Port Arthur Towing Co.*, 42 F.3d 312 (5th Cir.1995); see *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1009 (8th Cir. 1985). This result is not changed by the mode of trial in state court. *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2nd Cir.1947).

1. Overview: Limited Liability and Saving To Suitors

When a shipowner files its limitation complaint, the district court issues as a matter of course an *ex parte* injunction staying all related claims against the vessel owner pending in state or federal fora. See Supplemental Rule For Certain Admiralty and Maritime Claims F(3) (hereinafter these rules will be referred to as Supplemental Rule ___). Notice to claimants is issued and a claims bar date is set. Supplemental Rule F(4),(5). Claims are required to be filed in the action. Supplemental Rule F(5).

The resulting claims are categorized along two separate lines. First, there may be a single claimant or there may be multiple claimants. Where a single claimant seeks damages in excess of the limitation fund but files stipulations protecting the right of the shipowner to seek limitation in the federal court, the injunction will be dissolved

and the claimant permitted to litigate in state court. *Jefferson Barracks Marine Service*, 763 F.2d 1007, 1010. The claimant's right to proceed in state court is protected by the saving to suitors clause. **Id**; 28 U.S.C. §1333(1).

If there are multiple claimants, and the limitation fund is less than the value of all claims, a "concursus" is necessary to protect the shipowner from competing claims in different forums. See generally *In the matter of Helena Marine Service, Inc.*, 564 F.2d 15 (8th Cir. 1977). In that situation, state court actions will be enjoined to protect the vessel owner's right to seek limitation. *Helena Marine Service*, 564 F.2d 15, 18.

Second, the claims which are filed may or may not exceed the value of the vessel and freight. If they do not, it is an "adequate fund" case. "When the aggregate of all multiple claims will not exhaust the available limitation fund, the district court will not enjoin the prosecution of claims in other courts." *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1009 (8th Cir. 1985). "Where the limitation fund is sufficient to pay all potential claims . . . a concursus is unnecessary because the claimants need not compete among themselves for larger portions of a limited fund." *S & E Shipping Corp. v. Chesapeake & Ohio Ry. Co.*, 678 F.2d 636, 643 (6th Cir.1982).

> The [limitation] Act therefore is directed at maritime misfortunes in which the losses claimed exceed the value of the vessel and its freight. But when a shipowner is not exposed to potential liability in excess of that amount, the shipowner's absolute right to limit its liability is not implicated and 'the saving-to-suitors clause dictates that the admiralty court *must* allow suits

> pending against the shipowner in a common law forum, in this case the state court, to proceed. *In the Matter of the Complaint of Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir.1995) (italics by the court) (footnotes omitted); see also *The Helen L*, 109 F.2d 884, 886 (9th Cir.1940).

In the adequate fund case, "the vessel owner is not exposed to liability in excess of the limitation fund, and thus the vessel owner's rights under the Limitation Act are not implicated." *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1037 (11th Cir.1996). It follows that if the vessel owner's rights under the statute are not implicated, then the owner cannot avail itself of the procedures designed solely to protect those rights.

This is because the tension between the admiralty proceeding in federal court and the saving to suitors clause arises only when the federal proceeding is necessary to achieve the goal of limited liability. When the fund is sufficient to cover the claim, resort to the limitation act is unnecessary because the claim has already been limited to the value of the vessel or less. The language of the limitation act restricts its application to insufficient fund cases. *Petition of Moran Transportation Corp.*, 185 F.2d 386, 388-389 (2nd Cir.1950); see 46 U.S.C. §§ 183,184.

This analysis does not depend in any way on the claimant's seeking a jury trial in the state court. *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2nd Cir.1947); *Petition of Moran Transportation Corp.*, 185 F.2d 386 (2nd Cir.1950). The saving to suitors clause guarantees the claimant's substantial right to select the litigation forum. "[T]he entire purpose of the saving clause was to

give claimants pursuing a common-law remedy the ability to choose their forum, and such purpose would be completely diluted if defendants were allowed to remove saving-clause actions just like any other federal action." *In re Chimenti*, 79 F.3d 534, 538 (6th Cir.1996) (granting mandamus compelling remand); see also *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1063 (11th Cir.1996) (saving clause permits claimants to litigate in forum of their choice).

Petitioner's brief steers the wrong course, and assumes that the limitation statute even applies in this adequate fund case. Petitioner compounds this error by positing that the only remedy protected by the "saving to suitors" clause of the Judiciary Act of 1789 (28 U.S.C. §1333(1)) which justifies dissolving the injunction is a jury trial. But the *raison d'etre* of the injunction is to protect the right to limitation. Claimant's second stipulation conceded the right to limitation and thereby obviated the need for the injunction. In this case, both the policies underlying the limitation statute and the plain language of the statute itself required the district court to dissolve the injunction.

a. Statutory Policy

The purpose of the Limited Liability Act (46 U.S.C. §181, et seq.) is to encourage the development of American merchant shipping by exempting innocent shipowners from liability beyond the amount of their interest in the vessel. *Lake Tankers Corp. v. Henn*, 354 U.S. 147, 150, 1 L.Ed.2d 1246, 77 S.Ct. 1269 (1957); *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 n.3 (8th Cir. 1979). In the

adequate fund case the claim does not exceed the value of the vessel and its freight; therefore "[t]he state proceeding could have no possible effect on the petitioner's claim for limited liability in the admiralty court and the provisions of the Act, therefore, do not control." *Lake Tankers*, 354 U.S. 147, 153. An injunction against state court proceedings will be dissolved in this situation. 354 U.S. 147, 153-154.

The Eighth Circuit has noted in affirming the dissolution of a similar injunction that claimant's "consent has, in effect, eliminated the need for a concourse since it is unnecessary to apportion an inadequate limitation fund between two claimants." *Universal Towing Co.*, 595 F.2d 414, 420. This Court reasoned that "[t]here is no danger that Universal will be subjected to competing judgments in excess of its statutory limitation. Under the circumstances, a limitation proceeding will serve no other purpose than to deprive [claimant] of her right to pursue her common law remedies." 595 F.2d 414, 420.

A claimant satisfies the purpose of the statute, and is accordingly permitted to litigate against the shipowner outside the limitation proceeding, by stipulating that the claim is less than the value of the vessel. See *Lake Tankers*, 354 U.S. 147, 149-150. Once the statutory purpose of affording the vessel owner limited liability has been achieved, there is no need to restrict the claimant's ability to litigate in state court. *Complaint of Port Arthur Towing Co.*, 42 F.3d 312, 316 (5th Cir.1995); *Magnolia Marine Transport Co. v. Laplace Towing Corp.*, 964 F.2d 1571, 1575 (5th Cir.1992); see also *Fecht v. Makowski*, 406 F.2d 721, 723 (5th Cir.1969). This statutory purpose was achieved by the Second Stipulation filed in this case. (Tab R, A79.)

Accordingly, the district court properly dissolved the injunction.

b. Plain Language Of The Statute

The Second Circuit in *Petition of Moran Transportation Corp.*, 185 F.2d 386 (2nd Cir.1950) relied on the plain language of the statute to reject an argument analogous to that made by the petitioner in the case at bar. That case had begun as a single-claimant-inadequate fund case and the injunction against the state court action had been dissolved after the claimant had filed stipulations pursuant to *Petition of Red Star Barge Line, Inc.*, 160 F.2d 436 (2nd Cir.), *cert. denied* 331 U.S. 850, 91 L.Ed. 1859, 67 S.Ct. 1741 (1946).

But the district court permitted Todd Shipyards to file a late claim for substantially less than the value of the vessel. The petitioner sought to revive the previously dissolved restraining order, claiming that it was now faced with a "multiplicity of suits." The claimant countered by stipulating that Todd's claim would be paid in full out of the fund before anything would be paid on any judgment resulting from the claimant's state court case. The district court refused to restrain the state court action and petitioner appealed, arguing that the "multiplicity of suits" required all claims to be litigated in the limitation proceeding.

The Second Circuit affirmed:

> We think this argument rests on a misconception of the rights conferred by the statute. The statutory purpose is to exempt the investor from loss

in excess of the value of the investment in the vessel and freight. Where that value is obviously greater than all claims, no matter how many, the statute does not permit limitation. [citation]. This goes to show that the purpose of limitation proceedings is not to prevent a multiplicity of suits but, in an equitable fashion, to provide a marshalling of assets – the distribution pro rata of an inadequate fund among claimants, none of whom can be paid in full. [citations] Indeed, the very language of the statute bears this out: 46 U.S.C.A. §184 says that, when loss is suffered by several persons, 'and the whole value of the vessel, and her freight for the voyage, *is not sufficient to make compensation to each of them,* they shall receive compensation * * * *in proportion to their respective losses'*, and that the limitation proceedings are 'for the *purpose of apportioning the sum* * * * among the parties entitled thereto. *Petition of Moran Transportation Corp.*, 185 F.2d 386, 388-389 (2nd Cir.1950) (italics and ellipses by the court) (footnotes omitted); see also 46 U.S.C. §183.

The language of the statute itself thus establishes that its provisions are applicable **only** where the value of the vessel and freight is less than the value of the claims made. Obviously there is no need to apportion the limitation fund in a single claimant-adequate fund case such as this. The *Moran* court accordingly affirmed the district court's judgment because Todd Shipyards' claim did not change the "adequate fund" nature of the case and could not therefore be used as a basis to enjoin the state court action.

In the cause *sub judice*, the district court properly found that the case was within the *Lake Tankers* "adequate

fund" exception to exclusive federal jurisdiction because claimant had stipulated that "the value of his claim in the above matter is less than $400,000.00 and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc." (Second Stipulation of James Lewis, Joint Appendix Tab R, A79.) The vessel in question was appraised at $450,000 (Joint Appendix, Tab B, Affidavit of Value) and security in that amount was filed with the district court. (Joint Appendix, Tab C, "Security for Value.") The district court entered an order approving the stipulation for value on May 8, 1998. (Tab G, A19.) That value was never challenged by claimant. See Supplemental Rule F(7).

In dissolving the injunction, the district court found that

> Claimant has clearly met the adequate fund exception. The value of the limitation fund (here, $450,000) exceeds the total value of all claims asserted against the vessel owner (here, $400,000). Thus, Lewis & Clark is not exposed to liability in excess of the limitation fund and its rights under the limitation act are not implicated. District Court Order at p. 8, Joint Appendix Tab U, A87, 94.

The district court's order dissolving the stay is a proper exercise of discretion because petitioner has failed to – indeed cannot – demonstrate that its right to limit liability would be prejudiced by state court litigation. See *Universal Towing v. Barrale*, 595 F.2d 414, 420 (8th Cir.1979) (abuse of discretion standard of review measured by demonstration of prejudice to right to limit).

C. DISSOLUTION IS NOT PRECLUDED BY NON-JURY STATE CASES

1. *Curtis Bay*

Petitioner argues, however, that claimant's failure to demand a jury trial in his state court action precludes dissolution of the injunction. The Second Circuit specifically held in *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2nd Cir.1947) that a state court jury trial is **not** a prerequisite to dissolving the injunction in a limitation case such as this. In *Curtis Bay*, Judge Learned Hand reviewed the history and purpose of the Limited Liability Act as applied to the dissolution of an injunction against proceeding in state court in a non-jury case. The value of the limitation fund in that case was $209,000; the total claims were $17,000. The Second Circuit held that:

> We can see no justification in the case at bar for enjoining suits in Pennsylvania. The chance that the amount of the claims filed will ever be more than $209,000 is so remote, that it should not count, and the right to limit is not challenged. It is true that an injunction does not deny to any claimant 'the right of a common-law remedy where the common law is competent to give it;'[4]

[4] To the extent that this can be read to suggest that non-jury matters are outside the scope of the saving to suitors clause (**contra,** *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 68 L.Ed. 585, 44 S.Ct. 474 (1924)), the 1949 amendment to that statute clearly dispels the notion. "The 'saving to suitors' clause * * * was changed by substituting the words 'any other remedy to which he is otherwise entitled' for the words 'the right of a common-law remedy where the common law is competent to give it.' The substituted language is simpler and more expressive of the original intent of Congress and is in conformity with rule 2 of the Federal Rules of Civil Procedure abolishing the distinction between law and equity." Reviser's Note, H.Rep.No.308, 80th Cong., 1st Sess., p.A118 (1949).

> for the claimants are suing in the admiralty anyway. *However, every claimant has a legally protected interest in choosing his forum, even though the method of trial be not changed if he is moved elsewhere.*

159 F.2d 273, 276. (emphasis added); see also *In re Chimenti*, 79 F.3d 534, 538 (6th Cir.1996) (purpose of saving clause is to permit claimants to choose forum).

The *Curtis Bay* rationale has been approved by the United States Supreme Court. "Since the total amount of all potential claims in each case was only a fraction of that limit, the fund available for their satisfaction was more than ample. There was no reason, therefore, for permitting the petitioners to invoke a forum concursus." *Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 392, 93 L.Ed. 754, 69 S.Ct. 622 (1949).

In *Complaint of Universal Towing Co.*, 595 F.2d 414, 418 (8th Cir. 1979), the Eighth Circuit specifically relied on *Curtis Bay* to support the proposition that in two distinct circumstances federal courts permit "claimants to pursue their remedies in a forum of their own choosing. The first situation exists if the limitation fund exceeds the total of all claims. See, e.g., *Lake Tankers Corp. v. Henn, supra; Petition of Trinidad Corporation, supra; Curtis Bay Towing Co. v. Tug Kevin Moran*, 159 F.2d 273 (2d Cir.1947)." *Universal Towing*, 595 F.2d 414, 418. The citation to *Curtis Bay* is a tacit approval of the holding that a demand for a jury

trial is unnecessary in an adequate fund case, such as the instant matter.

In *Lake Tankers*, a limitation proceeding, the Supreme Court affirmed the dissolution of an injunction against state court litigation. "[W]here the value of the vessel and the pending freight, the fund paid into the proceeding by the offending owner, exceeds the claims made against it, there is no necessity for the maintenance of the concourse." 354 U.S. 147, 152. The Court noted that to "expand the jurisdictional provisions of the Act to prevent respondent from now proceeding in her state case would transform the Act from a protective instrument to an offensive weapon by which the shipowner could deprive suitors of their common-law rights, even where the limitation fund is known to be more than adequate to satisfy all demands upon it. The shipowner's right to limit liability is not so boundless." 354 U.S. 147, 152.

Thus, a claimant need not seek a jury trial in state court in order to return to that forum from the admiralty court.

2. The Saving To Suitors Clause Saves Non-Jury Proceedings In State Court

Although Petitioner flatly states that "[c]ourts have only applied these two exceptions, however, when a remedy provided to a claimant conflicts with the remedies to which a claimant is entitled through the 'savings to suitors' clause", (Petitioner's Brief at p.9), those remedies are not limited to jury trials. "The 'saving to suitors' clause of §1333(1) embodies a presumption in favor of jury trials *and other common law remedies* in the forum of

the damage claimant's choice." *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1063 (11th Cir.1996) (emphasis added); and see *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2nd Cir.1947).

In personam judgments resulting from non-jury trials are "other common law remedies" within the meaning of the saving to suitors clause. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 68 L.Ed. 585, 44 S.Ct. 474 (1924). The Supreme Court reversed the finding below that the state court lacked jurisdiction, and found that the equitable remedy of specific performance was within the saving to suitors clause.

> By reason of the saving clause, state courts have jurisdiction *in personam*, concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties. [citations] The 'right of a common law remedy', so saved to suitors, does not, as has been held in cases which presently will be mentioned, include attempted changes by the States in the substantive admiralty law, but it does include all other means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. It includes remedies in pais, as well as proceedings in court; judicial remedies conferred by statute, as well as those existing at common law; *remedies in equity*, as well as those enforceable in a court of law. 264 U.S. 109, 124 (emphasis added).

Of course, there was typically no right to jury in equitable matters. Thus, non-jury cases are unquestionably within the ambit of the saving clause.

This conclusion is re-enforced by the 1949 amendment to the saving clause, which substituted "any other remedy to which he is otherwise entitled" for "a common law remedy where the common law is competent to give it." 63 Stat. 101 (1949); and see footnote 4, above. Claimant's election to seek a non-jury trial in state court does not, therefore, take his case outside the protective scope of the saving clause.

Because claimant seeks in the state court a common law remedy, *viz.*, an in personam judgment against petitioner, his right to proceed in state court is fully protected by the saving clause. *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1486-1487 (5th Cir.1992).

Linton involved a Jones Act defendant's attempt to remove a state court suit based on the plaintiff's election pursuant to La.Code Civ.Proc.Ann. Art. 1732(6) (West 1990) to proceed as a non-jury matter. The district court had refused to remand the case, reasoning that the plaintiff's election to proceed as a non-jury matter in state court sought " 'a remedy in admiralty which the common law is not competent to give but which lies within the maritime jurisdiction reserved exclusively to the federal sovereign.' " 964 F.2d 1480, 1485. The Fifth Circuit reversed, holding that

> "particularly in view of the revised wording of the 'saving to suitors' clause, the Supreme Court cases do not require a jury trial as an element of a 'saving to suitors' remedy. Stated differently, a maritime non-jury action is not necessarily outside the scope of the 'saving to suitors' clause and within the exclusive admiralty jurisdiction of the federal courts." 964 F.2d 1480, 1487.

Thus, the failure to demand a jury in the state court action does not require denial of the motion to dissolve because the saving to suitors clause is still applicable.

As applied to the instant case, petitioner has no right to insist on a federal forum because the right protected by that federal forum, *i.e.* limitation of liability, has been achieved. Claimant's right to proceed in state court is protected by the saving to suitors clause of 28 U.S.C. §1333(1), even though no jury is sought in the state court. Accordingly, the district court properly dissolved the injunction.

D. The Cases Relied On By Petitioner Are Not Persuasive Authority

The only cases cited by petitioner as direct support for its contention that a demand for jury trial in state court is a *sine qua non* for dissolution of the injunction are unpublished district court cases.[5] These citations violate 8th Cir. R. 28A(i) which provides in pertinent part that "[u]npublished opinions are not precedent and parties generally should not cite to them." 8th Cir. R. 28A(i). Petitioner has offered no explanation for its citation to these unpublished decisions in its brief. Compare *Slaaten v. United States*, 990 F.2d 1038, 1043 (8th Cir.1993) (unpublished decision was basis for administrative agency's action).

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[5] *In re Complaint of Eagle Marine Industries, Inc.*, No. 4:97CV0357 (ERW), Memorandum and Order (October 16, 1997); *In the Matter of Suard Barge Service, Inc.*, 1997 WL 97226 (E.D.La.) (March 6, 1997); and *S & E Shipping Corp v. Chespeake & Ohio Railway Co.*, 1982 AMC 2940 (N.D.Ohio1982).

This Court has previously rejected attempts to cite to unpublished district court rulings. See, e.g., *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1381, n8 (8th Cir.1993); *Federal Deposit Insurance Corp. v. Newhart*, 892 F.2d 47, 50, n3 (8th Cir.1989); and *Webb v. Bowen*, 851 F.2d 190, 192, n6 (8th Cir.1988).

Although this is sound enough reason not to rely on these unpublished decisions, there are other reasons. Not one of these cases involved an adequate fund, which is the central analytical feature of the cause *sub judice*. Not one examined the impact of *Curtis Bay* on the dissolution analysis. Not one analyzed the *Red Cross Lines* holding that non-jury cases are within the saving to suitors clause.

Petitioner relies heavily on *In re Complaint of Eagle Marine Industries, Inc.*, No. 4:97CV0357 (ERW), Memorandum and Order (October 16, 1997). However, *Eagle Marine* was not an adequate fund case nor a single claimant case and therefore is entirely inapposite to the cause *sub judice*. "Claimant disputes the $50,000 amount set by petitioners as the value of the subject vessel and her freight." (*Eagle Marine*, at p. 6.) Thus, the entire rationale of *Curtis Bay* – adequate fund cases satisfy the Limited Liability Act's purpose – is absent from *Eagle Marine*. That case is not authority to maintain the injunction in the instant case.

Neither is *In the Matter of Suard Barge Service, Inc.*, 1997 WL 97226 (E.D.La.) (March 6, 1997), another unpublished order involving a multiple claimant-inadequate fund situation. Such a case is not controlling in the case at bar because, again, the rationale of *Curtis Bay* is inapplicable to an inadequate fund case.

S & E Shipping Corp v. Chespeake & Ohio Railway Co., 1982 AMC 2940 (N.D.Ohio1982) is also unpublished. The district court originally granted claimant's motion to dissolve the injunction, but the Sixth Circuit reversed. *S & E Shipping Corp v. Chespeake & Ohio Railway Co.*, 678 F.2d 636 (6th Cir.1982). The circuit opinion in that case recognized that "if the limitation fund exceeds the aggregate of all claims, claimants must be permitted to proceed in other forums." 678 F.2d 636, 643. Just as clearly, the Sixth Circuit recognized that "[t]he Chessie System's claims for attorneys' fees and costs, however, present multiple claims-inadequate fund situation." 678 F.2d 636, 645-646. The Court of Appeals reversed. On remand, the injury claims were settled. 1992 AMC at 2940. The remaining claimant, the Chesapeake & Ohio Railway Co., moved to dissolve the restraining order. The district court denied the motion, ostensibly because the claimant had failed to demand a jury trial. 1982 AMC at 2943. However, the district court failed to discuss, or even cite, *Curtis Bay*. The court's casual rejection of the significance of the adequate fund concept (1982 AMC at 2940), conflicts with the circuit opinion in the same case. See 678 F.2d 636, 643.

Moreover, in the context of the inadequate fund case before the district court, it is pure dictum. See generally *Kastigar v. United States*, 406 U.S. 441, 454-455, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972) (broad language unnecessary to decision is not binding authority); *Smith v. Orr*, 855 F.2d 1544, 1550 (Fed.Cir.1988) (general expression not essential to decision is not controlling in subsequent cases).

Given the lack of detailed analysis by the court, its gratuitous commentary is not persuasive authority. See *In the matter of Helena Marine Service, Inc.*, 564 F.2d 15, 19 n6

(8th Cir. 1977) (finding opinion unpersuasive for failing to analyze crucial issue). This analytical failure is precisely the reason unpublished decisions are not to be cited. "We do not give precedential weight to unpublished opinions [citation], and the holdings are essentially assertions without detailed reasoning, so as to have no persuasive value." *Federal Deposit Insurance Corp. v. Newhart*, 892 F.2d 47, 50, n3 (8th Cir.1989).

Indeed, this Court does not give its own unpublished decisions precedential value. *Webb v. Bowen*, 851 F.2d 190, 192, n6 (8th Cir.1988). In this circumstance, the cases principally relied upon by petitioner should not be treated as exceptions to the dictate of Circuit Rule 28A(i) that "[u]npublished opinions are not precedent. . . . "

II. PETITIONER'S CHALLENGE TO THE SUFFICIENCY OF CLAIMANT'S STIPULATIONS SHOULD BE REJECTED

A. Claimant's Stipulations Were Sufficient

Petitioner argues that claimant's failure to stipulate to the adequacy of petitioner's stipulation for value precludes dissolution of the injunction. See Petitioner's Brief at p.14-16. Petitioner does not acknowledge claimant's failure to object to the sufficiency of the stipulation for value. When a claimant does not object to sufficiency of the stipulation for value, but has otherwise complied with the stipulation requirements, he has substantially complied with the rules for dissolving the injunction. *Newton v. Shipman*, 718 F.2d 959 (9th Cir.1983).

In *Newton*, the district court had refused to dissolve the injunction based on the identical insufficiency claimed in the case at bar. Claimant had filed the following stipulation: " 'Claimant acknowledges the Court's right to try the 'limitation' features of the petition, and waives any claim of res judicata relevant to the issue of limited liability based upon any judgment obtained in the jury trial.' " 718 F.2d 959, 963. The Court of Appeals noted that "Shipman did not object to the sufficiency of the fund or the method of computing it. See Fed.R.Civ.P., Supp.R.F(7). Considering all the circumstances, we find that claimant Shipman substantially satisfied the required stipulations." 718 F.2d 959, 963. The Court of Appeals reversed the refusal to dissolve the injunction. Petitioner's claim should be rejected for the same reason.

1. Clarification of Stipulations

Petitioner has predicated one of its arguments for reversal on the content of the stipulations filed with the district court. Claimant argued in the district court that the stipulation that his claim does not exceed the limitation fund "removes any federal interest in retaining jurisdiction because the end of the exercise of federal jurisdiction – limitation of liability – has already been met." Tab R, A77. To clarify as precisely as possible the intent of claimant, leave to file the following additional stipulation has been sought from this Court by separately filed motion (see Addendum to Brief):

1. Under no circumstances will claimant James Lewis seek, accept nor attempt to enforce against petitioner Lewis & Clark Marine, Inc. any judgment from any

court anywhere for an amount in excess of $400,000 for any and all claims connected in any way whatever with the incident described in the Complaint as having occurred on or about March 17, 1998, where claimant James Lewis tripped over a wire and injured his back;

2. Claimant James Lewis stipulates that the value of the petitioner's interest in the vessel plus freight is $450,000 and that petitioner's stipulation for value is sufficient.

Claimant submits that this additional stipulation cures any possible objection raised by petitioner and comports with claimant's intent to protect petitioner fully from any possibility of a judgment in excess of the limitation fund.

Leave to file an amended stipulation in the Court of Appeals was granted in *Complaint of Dammers & Vanderheide*, 836 F.2d 750, 759 (2d Cir.1988). Other circuits have remanded to the district court to permit amended stipulations to be filed. *Newton v. Shipman*, 718 F.2d 959, 963 (9th Cir.1983); *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1044 (11th Cir.1996). In any event, it is clear that additional stipulations may be filed so that the petitioner's interests are protected. The effect of the proposed additional stipulation is to make crystal-clear that petitioner has successfully limited its liability to an amount less than its interest in the vessel and freight. Given the additional stipulation, petitioner respectfully submits that any technical deficiency in the original stipulations has been cured and that the district court's order should be affirmed.

2. Claimant Need Not Personally Sign The Stipulations

Petitioner also claims error because the stipulations filed in the district court were signed by claimant's attorney rather than claimant himself. This Court has previously rejected the precise claim in *Valley Line Co. v. Ryan*, 771 F.2d 366, 376 (8th Cir.1985), and no further discussion of the issue is necessary.

B. Wag The Dog: Exoneration Is A Procedural Adjunct To A Limitation Proceeding And Not A Right Independent of Limitation

Exoneration is an adjunct procedure which cannot be employed to deprive the claimant of his substantive right to a determination of liability by the state court. "Where no grant of limitation is possible, the basis for granting exoneration vanishes. In such a case, a boat owner should not be treated any more favorably than an automobile driver." *Fecht v. Makowski*, 406 F.2d 721, 723 (5th Cir.1969). Petitioner's claim to a right of exoneration independent of a right to seek limitation would improperly permit the exoneration "tail" to wag the limitation "dog."

In *Fecht*, the petitioner was actually operating the boat and admitted that his actions had to be within his "privity or knowledge," thereby precluding limitation. 406 F.2d 721, 722-723 and n4. The Fifth Circuit concluded that there was no basis to permit exoneration in the absence of a genuine limitation proceeding. 406 F.2d 721, 723. This rationale is applicable to the instant case because here the statutory purpose for limitation has been exhausted. *Cf. Petition of Moran Transportation Corp.*,

185 F.2d 386, 388-389 (2nd Cir.1950) (limitation inapplicable in adequate fund case). Accordingly there is no independent "right" to exoneration in this case.

This conclusion is also required by the Rules Enabling Act (28 U.S.C. §2072(b)), which prohibits an independent action for exoneration based on a procedural rule. The Rules Enabling Act authorizes the promulgation of rules relating to procedure. 28 U.S.C. §2072(a). That authorization is limited by the provision that "[s]uch rules shall not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b).

As the District Court in the instant case noted, the Limitation Act does not itself mention exoneration. District Court order at p. 9. The source of the exoneration procedure is Supplemental Rule F(2). The Supplemental Admiralty Rules were, like Rule 14(c), Fed.R.Civ.P., promulgated pursuant to the Rules Enabling Act, 28 U.S.C. §2072. Order of February 28, 1966, pars. 1 and 3, 383 U.S. 1031, 15 L.Ed.2d LXXV, ___ S.Ct. ___ (1966). They therefore cannot "enlarge or modify" any substantive right conferred on petitioner by the Limitation Act nor can they "abridge or modify" any right afforded claimant by the saving to suitors clause. 28 U.S.C. §2072(b); see *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007, 1011, supra.

The shipowner in *Jefferson Barracks Marine Service, Inc. v. Casey*, 763 F.2d 1007 (8th Cir.1985) argued that dissolving the injunction against state court action was inappropriate because certain admiralty procedures were unavailable in state court. "We are not impressed by claimants' argument that the state court proceeding

deprives it of the use of Rule 14(c)[6] of the Federal Rules of Civil Procedure. If claimants have a substantive right to pursue their cause of action under the 'saving to suitors clause,' it can hardly be abrogated by a federal procedural rule. N2 See 28 U.S.C. §2072 authorizing promulgation of the Federal Rules of Civil Procedure. 'Such rules *shall not abridge, enlarge, or modify any substantive right* and shall preserve the right of trial by jury as at common law.[7]' " *Jefferson Barracks Marine Service*, 763 F.2d 1007, 1011 (emphasis added); *accord Complaint of Dammers & Vanderheide*, 836 F.2d 750, 760 (2d Cir.1988). "The Supplemental Rules, as their name suggests, are supplemental." 12 Wright, Miller & Marcus, Federal Practice and Procedure: Civil 2d §3201, p. 571 (West 1997). To permit the vessel owner by means of a procedural rule to pursue a right of action for exoneration is to grant and abridge substantive rights which is specifically forbidden by the Rules Enabling Act.

Moreover, the procedure advocated by petitioner flies in the face of judicial economy and is in conflict with claimant's rights under the saving clause. To permit an exoneration proceeding after a state court judgment would effectively nullify the right to proceed in state court which, as discussed Part IB2 above, is guaranteed by the saving to suitors clause.

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[6] Rule 14(c), Fed.R.Civ.P. provides procedures for third-party practice in admiralty cases.

[7] The language relating to trial by jury was deleted by the 1988 amendment. Publ.L. 100-702, Title IV, §401(a), Nov.19, 1988, 102 Stat. 4648.

After judgment in state court, there is no reason to re-invent the liability wheel with a subsequent federal exoneration proceeding unless Congress clearly intended to permit it. That Congressional intent is not only absent in this case but the opposite intent is clearly presented by the saving to suitors clause.

CONCLUSION

Wherefore, claimant-appellee James Lewis respectfully prays that this Honorable Court affirm the order of the district court.

THE LAKIN LAW FIRM, P.C.

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Attorney for Appellee,
James F. Lewis

CERTIFICATE OF COMPLIANCE

I certify that this brief is proportionately spaced, using Times New Roman font, 14 point type. Using Corel Word Perfect 8, this brief contains 7,722 words, excluding the summary of the case, table of contents, table of authorities, addendum, and certificates of counsel.

I also certify that the computer diskette provided herewith has been scanned for viruses under *McAfee* and has been found to be virus-free.

[Certificate Of Service Omitted In Printing]

ADDENDUM

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 99-1346

IN THE MATTER OF THE COMPLAINT
OF LEWIS & CLARK MARINE, INC.
Appellant,

v.

JAMES F. LEWIS
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 4:98CV0503 (MLM)
The Honorable Marry Ann L. Medler,
U.S. Magistrate Judge

MOTION FOR LEAVE TO FILE THIRD STIPULATION

Now comes claimant-appellee James Lewis, by his undersigned counsel of record and respectfully requests leave of this Honorable Court to file an additional stipulation to effect the claimant's previously expressed intent to grant the petitioner the limited liability which it has sought. (See Memorandum In Support of Motion To Dissolve, Tab R, A77.) Claimant Lewis respectfully requests leave to file the additional stipulation attached hereto.

WHEREFORE, claimant James Lewis respectfully requests leave to file the attached Third Stipulation of James Lewis.

Respectfully submitted,

THE LAKIN LAW FIRM, P.C.

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James F. Lewis

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1346

IN THE MATTER OF THE COMPLAINT
OF LEWIS & CLARK MARINE, INC.
Appellant,

v.

JAMES F. LEWIS
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Case No. 4:98CV0503 (MLM)
The Honorable Marry Ann L. Medler,
U.S. Magistrate Judge

ORDER

The motion of claimant-appellee for leave to file a Third Stipulation in this matter is hereby GRANTED.

/s/ _____
PER CURIAM

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1346

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Appellant,

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Case No. 4:98CV0503 (MLM)
The Honorable Marry Ann L. Medler,
U.S. Magistrate Judge

MEMORANDUM IN SUPPORT OF MOTION TO FILE THIRD STIPULATION

Now comes claimant-appellee James Lewis, by his undersigned counsel of record and files this memorandum in support of his motion for leave to file third stipulation.

Petitioner has raised certain technical objections to the form of the stipulations filed by claimant-appellee in the district court. See Petitioner's Brief at pp. 18-19. Petitioner's objections are that claimant's existing stipulations are insufficient because they do not 1) limit claimant's claim for damages in the state court action to $400,000; 2) did not concede the sufficiency of the limitation fund; and 3) did not provide that in no event would claimant seek to enforce an excess judgment or recovery

insofar as it may expose petitioner to liability in excess of $450,000 (the amount of the limitation fund) pending adjudication of limitation of liability in the district court. See Petitioner's Brief at p. 19.

Claimant had filed in the district court stipulations which were intended not simply to protect the petitioner's right to seek limitation of liability, but actually to grant such limitation. See Joint Appendix, Claimant's Reply Memorandum at Tab R, A77.[1] Claimant's initial stipulation provided that:

1. He waived any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in state court (Tab N, A52, par. 8);

2. He stipulated to petitioner's right to litigate issues relating to limitation in the limitation proceeding; (Tab N, A52, par.8);

3. He was the sole claimant; (Tab N, a52, par. 6).

Claimant subsequently filed a Second Stipulation (Tab R, A79), that the value of his claim was "less than $400,000.00 and less than the value of the limitation fund filed by petitioner Lewis and Clark Marine, Inc." (Tab R, A79).

Claimant clearly intended to concede that petitioner's liability was, in fact, limited. See Claimant's Reply Memorandum, Tab R, A77. Petitioner's only objection to the stipulations that were filed is that those stipulations do not clearly establish protection for the petitioner. See Petitioner's Brief at p. 19. The proposed

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[1] References to the record are to pages of the Joint Appendix by alphabetical Tab reference and apppendix page.

Third Stipulation simply addresses the concerns articulated by petitioner so that claimant's intended protection of the petitioner's right to limit is actually achieved.

Leave to file an amended stipulation in the Court of Appeals was granted in *Complaint of Dammers & Vanderheide*, 836 F.2d 750, 759 (2d Cir.1988). Other circuits have remanded to the district court to permit amended stipulations to be filed. *Newton v. Shipman*, 718 F.2d 959, 963 (9th Cir.1983); *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032, 1044 (11th Cir.1996). In any event, it is clear that additional stipulations may be filed so that the petitioner's interests are protected. Because the additional stipulation simply clarifies that claimant has conceded the relief sought by petitioner, *viz.*, limited liability, petitioner can suffer no prejudice from allowance of the motion.

WHEREFORE, claimant James Lewis respectfully requests that the Honorable Court grant him leave to file his Third Stipulation.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1346

IN THE MATTER OF THE COMPLAINT
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The Honorable Marry Ann L. Medler,
U.S. Magistrate Judge

THIRD STIPULATION OF JAMES LEWIS

Now comes James Lewis, claimant-appellee herein and stipulates that:

1. Under no circumstances will claimant James Lewis seek, accept nor attempt to enforce against petitioner Lewis & Clark Marine, Inc. any judgment from any court anywhere for an amount in excess of $400,000 for any and all claims connected in any way whatever with the incident described in the Complaint as having occurred on or about March 17, 1998, where claimant James Lewis tripped over a wire and injured his back;

2. Claimant James Lewis stipulates that the value of the petitioner's interest in the vessel plus freight is

$450,000 and that petitioner's stipulation for value is sufficient.

BY: /s/ Roy Dripps
Roy Dripps,
attorney for James Lewis

IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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Case No. 4:98CV0503 (MLM)
The Honorable Mary Ann L. Medler,
U.S. Magistrate Judge

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STATEMENT OF ISSUES

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A. Petitioner Has The Right To Have Its Claim For Exoneration Decided By The Federal Court

- *In the Matter of Tidewater, Inc.*, 938 F.Supp. 375 (E.D. La. 1996)

B. Claimant Has Failed To Demonstrate That Petitioner's Right To Exoneration And Limitation In The Federal Court Conflicts With The Saving To Suitors Clause.

- *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063 (5th Cir. 1981)
- *Complaint of S&E Shipping Corp.*, 1982 A.M.C. 2940 (N.D. Ohio 1982)
- *In re Eagle Marine Industries, Inc.*, No. 4:97CV0357 ERW (E.D.Mo. October 16, 1997)

II. THIS COURT SHOULD REVERSE THE DISTRICT COURT DECISION TO STAY PETITIONER'S EXONERATION FROM AND LIMITATION OF LIABILITY PROCEEDING AND TO LIFT THE STAY IMPOSED ON LITIGATION BECAUSE CLAIMANT'S NEW PROPOSED STIPULATIONS FAIL TO ADEQUATELY PROTECT PETITIONER'S RIGHTS.

- *Jefferson Barracks Marine Serv. Inc. v. Casey*, 763 F.2d 1007 (8th Cir. 1985)

ARGUMENT

I. The District Court Abused its Discretion by Staying Petitioner's Exoneration From and Limitation of Liability Proceeding and Lifting the Stay Imposed on Litigation As Petitioner's Right to Seek Exoneration in the Federal Court Outweighs Claimant's Right to Pursue a Claim in Illinois State Court Without a Jury.

Claimant's Reply Brief is a collection of boiler plate cases, some of which are clearly inapposite, but all of which fail to rebut the two basic propositions upon which this appeal rests: (1) once the jurisdiction of the admiralty court is properly invoked in a limitation of liability proceeding, the district court has jurisdiction to decide exoneration as well as limitation; and (2) the single Jones Act claimant will be allowed to proceed to the state law forum under the saving clause only if he seeks a remedy not available in the federal forum. Claimant's Brief attacks these propositions with inapposite dicta, but never really confronts their logic. For the reasons set forth more fully below, this Court should reject Claimant's arguments and reverse the court below.

A. Petitioner Has The Right To Have Its Claim For Exoneration Decided By The Federal Court.

Claimant erroneously asserts in his Brief that the dissolution of the injunction was appropriate "because claimant stipulated to all of the relief which the limitation proceeding could afford: a determination that the value of the petitioner's interest in the vessel exceeded the value of the claim." (*See* Appellee's Brief, p. 6). This is

simply inaccurate. The argument ignores the fact that Petitioner's action is for exoneration, as well as limitation. In fact, Petitioner's Complaint first seeks exoneration from liability and requests limitation of liability in the alternative. (Separate Appendix, A4)

Petitioner's request for exoneration first and limitation second is consistent with the procedure to be followed in limitation actions. As the Fifth Circuit stated in *Complaint of Port Arthur Towing Co.*, 42 F.3d 312, 317 (5th Cir. 1995):

> A limitation proceeding generally comprises a two-step process, **the first being "the establishment of liability of the shipowner to the claimant,** as to which the claimant (or libellant) bears the burden." "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit." Thus [claimant] was required initially to prove facts supporting his claim that [the vessel owner] was liable to him for his alleged injury. (citations omitted) (emphasis added)

This is consistent with the language of the limitation statute, 46 U.S.C. §183. The liability of the vessel owner "shall not . . . exceed" the value of the vessel and pending freight. The determination whether there is any liability at all is decided part and parcel in the limitation action. The liability of the vessel owner in the first instance is not assumed by the statute. Further, there is no provision that can be read to call for a separate determination of liability from limitation. The bundle of rights bestowed upon a shipowner by §183 includes the right to a federal forum in which liability and limitation are determined. This

right is not modified or diminished simply by the presence of a single Jones Act claimant. Thus, exoneration is a threshold issue in limitation proceedings.

Case law supports the proposition that once the jurisdiction of the court is invoked by a validly instituted limitation proceeding, Petitioner is entitled to have the issue of exoneration decided by the federal court. *In the Matter of Tidewater, Inc.*, 938 F.Supp. 375 (E.D.La. 1996). In *Tidewater*, the single claimant in a limitation of liability action stipulated that he would not seek a judgment in the pending state court action in excessive of the limitation fund. *Id.* at 377. The district court, however, found such the stipulation was deficient because "it fails to protect Tidewater's right to litigate the issue of exoneration in federal court." *Id.* at 379. The court reasoned that:

> [I]t would not adequately protect the rights of the party seeking exoneration in federal court to allow a state court action to proceed in which it could be held liable for an amount up to the limitation bond. Thus, while [claimant] agrees not to enforce any judgment(s) that exceed the limitation fund of $2,2000,000.00 [sic] until after the limitation action, he is presumably free to collect any judgment(s) below the limitation. As the stipulation is currently worded, Tidewater may be exonerated in the limitation action, but may be forced to pay out a state court judgment of up to $2,200,000.

Id.; See also In the Matter of Falcon Drilling Company, 1996 WL 363445 (E.D.La. June 28, 1996) (holding that a stipulation is inadequate if it does not protect the petitioner's right to litigate the exoneration issue in federal court); *In the Matter of Suard Barge Service, Inc.*, 1997 WL 97226

(E.D.La. March 6, 1997) (finding that a stipulation wherein the claimant agreed to waive any claim of res judicata relevant to the issue of exoneration was adequate).

The same reasoning applies in this case. Pursuant to Supplemental Admiralty Rule F, Petitioner demanded in its Complaint exoneration as well as limitation of liability. In a §183 proceeding, the first issue to be decided by the Court is whether the vessel owner is entitled to complete exoneration due to the absence of negligence by the vessel owner. Claimant's stipulation that its claim does not exceed the value of the vessel does not negate Petitioner's right to have the issue of exoneration decided first in the federal court. Otherwise, Petitioner could be subject to a judgment in state court less than the value of the vessel and exonerated from liability by the district court – a result that the district court in *Tidewater* found unacceptable.

In his Brief, Claimant relies upon cases in which the courts held that the injunction of other actions should be dissolved if the claims do not exceed the limitation fund. The cases cited by Claimant on this point are simply inapposite. Those cases only consider a vessel owner's right to pursue **limitation of liability** in federal court. The cases do not address the vessel owner's right to **exoneration** in federal court. Apparently, the vessel owners in those cases did not assert the right to exoneration. Accordingly, they are not controlling here as Petitioner has claimed its right to exoneration by the federal court.

The rule urged by Claimant is really an ad hoc rule of judicial convenience. Claimant is essentially arguing that, if he is entitled to go to the state court, he might as well have the Court decide the liability issue exclusively, since he is there anyway, and it will avoid duplication of effort. The manifest problem with that approach is that there is no basis in legal logic to wrest from the federal court the ability to determine liability *ab initio*, which it would have in any other limitation action. No basis, that is, other than Claimant's desire to have it that way.

Moreover, Petitioner's right to exoneration as well as limitation in this case has not been adequately protected by the stipulations filed by Claimant. As set forth in Section II below, Claimant has failed to sign a stipulation that adequately protects Petitioner's right to exoneration and limitation in the federal court.

B. Claimant Has Failed To Demonstrate That Petitioner's Right To Exoneration And Limitation In The Federal Court Conflicts With The Saving To Suitors Clause.

As set forth in Petitioner's opening Brief, there is no conflict between its right to exoneration and limitation in federal court and the saving to suitors clause because Claimant has not requested a jury trial in state court. This fact is further demonstrated by the cases cited in Claimant's Brief. As this Court stated in *Universal Towing Co. v. Barrale*, 595 F.2d 414, 417 (8th Cir. 1979), a case relied upon by Claimant, "[i]nsofar as limitation proceedings **deprive claimants of the right to trial by jury**, they conflict with the provisions of 28 U.S.C. §1333. . . . "

(emphasis added). Likewise, in *Lake Tankers Corp. v. Henn*, 354 US. 147, 77 S.Ct. 1269, 1272-73, 1 L.Ed.2d 1246 (1957), the United States Supreme Court declared that "the respondent must not be thwarted in her attempt to employ her common-law remedy in the state court **where she may obtain trial by jury.**" (emphasis added). These cases firmly establish that it is a claimant's right to trial by jury in nonmaritime state court actions under the saving to suitors clause that conflicts the right to exoneration and limitation of liability. This conflict does not exist in this case.

In an effort to create a conflict in this case where none exists, Claimant cites *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060, 1063 (11th Cir. 1996) which states that the saving to suitors clause "embodies a presumption in favor of jury trials **and other common law remedies** in the forum of the damage claimant's choice." (emphasis added). Claimant's reliance upon *Suzuki* is disingenuous. He has utterly failed to identify any "other common-law remedies" that he wishes to pursue in his state court action that are not available to him in the federal court.

Claimant further compounds his misuse of *Suzuki* by erroneously asserting that the case holds that the saving clause permits claimants to litigate in the forum of their choice. (Appellee's Brief, p. 13). The court in *Suzuki* first recognized that "[a] vessel owner's claim to limited liability must be adjudicated exclusively in the admiralty court, **which sits without a jury.** *Id.* at 1063 (emphasis added). The court then went on to find that the true conflict in these cases is created by the "tension between the exclusive admiralty jurisdiction over Limitation Act

claims and **the presumption favoring jury trials** under the saving to suitors clause. . . . " *Id.* at 1063 (emphasis added). *Suzuki* therefore holds that the saving to suitors clause favors common law remedies such as jury trials, which are available in the nonmaritime forum of a state court but not in a federal court sitting in admiralty. Thus, the claimant's choice of forum as referenced in *Suzuki* is merely incidental to his remedy under the saving clause of trial by jury.[1]

This conclusion is supported by well-established case law that holds that the saving clause does not guaranty maritime suitors a nonfederal forum. *See e.g., Tennessee Gas Pipeline v. Houston Casualty Insurance Co.*, 87 F.3d 150, 153 (5th Cir. 1996); *Poirrier v. Nicklos Drilling Co.*, 648 F.2d 1063, 1066 (5th Cir. 1981). In *Poirrier*, the plaintiff filed suit in Louisiana state court pursuant to the saving to suitors clause alleging that he was injured on an inland submersible drilling barge on the Atchafalaya River as a result of the barge owner's negligence. The defendant, invoking the diversity jurisdiction of the federal courts, removed the action to the United States District Court for the Eastern District of Louisiana. Plaintiff moved to

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[1] For the same reason, Claimant cannot rely upon the Sixth Circuit's holding in *In re Chimenti*, 79 F.3d 534, 537 (6th Cir. 1996), which states that the purpose of the saving clause "was to give claimants **pursuing a common-law remedy** the ability to choose their forum" (emphasis added). As in *Suzuki*, the Court in *Chimenti* first required that the claimant pursue a common law remedy before his ability to choose a forum was even implicated. Because no common law remedy within the scope of the saving clause has been asserted in this case, Claimant has no right to choose a forum other than the federal admiralty court.

remand on the grounds that removal violated the express provisions of the saving to suitors clause.

The Fifth Circuit rejected plaintiff's argument and held that maritime actions brought in state court pursuant to the saving clause are removable on diversity grounds. The Fifth Circuit held that:

> The "saving to suitors" clause does no more than preserve the right of maritime suitors to pursue nonmantime *remedies*. It does not guarantee them a nonfederal *forum*, or limit the right of defendants to remove such actions to federal court where there exists some basis for federal jurisdiction other than admiralty.

Poirrier, 648 F.2d at 1066 (italics in original); *See also* 14A Wright, Miller & Cooper, *Federal Practice and Procedure*, §3674 (1998) ("The saving-to-suitors' clause has long been construed to afford litigants a choice of remedies, not of forums."); *In re Chimenti*, 79 F.3d 534, 537 (6th Cir. 1996) (recognizing a maritime defendant's right to remove to federal court if an independent basis for federal jurisdiction exists).

The Fifth Circuit's holding in *Poirrier* completely rebuts Claimant's contention that the saving to suitors clause preserves his choice of forum. As stated in *Poirrier*, the saving clause merely preserves Claimant's right to pursue nonmaritime remedies, such as trial by jury. In this case Claimant has not sought the nonmantime remedy of trial by jury. Instead, the only "remedy" Claimant desires is to avoid the federal forum even though he will get the same remedy in both courts, *i.e.*, a bench trial without a jury. Such forum shopping is not a "remedy" saved to Claimant by the saving to suitors clause.

The case of *Curtis Bay Towing Co. v. Tug Kevin Moran*, 159 F.2d 273 (2d Cir. 1947) offers no support for Claimant's position. The court in *Curtis Bay* did not address or even mention the vessel owner's right to exoneration in federal court. Rather, the court simply held that the petitioner was not entitled to an injunction prohibiting other actions because the limitation fund was adequate.

Claimant further misrepresents the holding in *Curtis Bay* as it does not provide that the saving to suitors clause guaranties a claimant a nonfederal forum. In fact, *Curtis Bay* recognized that enjoining the claimants' suits in Pennsylvania did not "deny to any claimant 'the right of a common-law remedy where the common law is competent to give it. . . . " *Id.* at 276. Moreover, when the court referred to a claimant's interest in choosing his forum, it was not talking about a federal versus nonfederal forum. Rather, the court was discussing "forum" in terms of the doctrine of forum non-conveniens. This is clearly demonstrated by the following portion of the opinion which Claimant conveniently omitted from the [sic] his Brief:

> The privilege of limiting liability is not part of any doctrine of forum nonconveniens; a shipowner, sued in several places by several persons, has no advantage over other persons in the same position. If he would consolidate the several suits against him, he must fulfill those conditions which govern the consolidation of actions; if he would move them for trial elsewhere, he must fulfill those which govern the removal of cases.

Id. Curtis Bay simply holds that in a case where the shipowner no longer has a jurisdictional basis to be in

federal court, its desire to have all claims asserted against it litigated in one convenient forum does not trump a plaintiff's general interest in choosing his own forum. *Curtis Bay* does not address the shipowner's right to exoneration in federal court and does not find that the saving clause protects a claimant's choice of a nonfederal forum.

Claimant's reliance upon *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 68 L.Ed. 582, 44 S.Ct. 474 (1924) is similarly misplaced. In that case, the United States Supreme Court decided whether agreements for arbitration of disputes arising under maritime contracts were within the scope of the New York Arbitration Law. The case did not involve the limitation of liability statute or a determination of whether the Jones Act claimant can pursue a nonjury remedy under the saving to suitors clause. The issue before that Court was maritime arbitration, a customary and ordinary practice dating back to 1320, centuries before the passage of the saving to suitors clause. *See* 264 U.S. at 122, 58 L.Ed. at 586, n. (and the reference to Selden Society, Select Pleas in the Court of Admiralty). As pointed out in Petitioner's Brief, the remedy saved must predate the advent of federal admiralty jurisdiction, but must also be unavailable in the limitation proceeding. The maritime arbitration remedy met both requirements; Claimant's Jones Act suit meets neither.

Claimant also relies upon *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir. 1992), a case that simply has no application to the instant case. In *Linton*, the defendant removed the plaintiff's Louisiana state court Jones Act case, arguing that the federal court had

exclusive jurisdiction because the case had been designated a admiralty and maritime claim pursuant to a Louisiana statute and was non jury. The Fifth Circuit rejected this argument, finding that a maritime nonjury action was a remedy within the scope of the saving to suitors clause.

Linton is inapplicable because it was not a limitation action and, unlike in this case, the defendant in *Linton* did not have an independent jurisdictional basis to be in federal court. *Linton* does not address the issue before this Court in that the Fifth Circuit did not weigh a petitioner's interest in limitation and exoneration in federal court against a claimant's interest in pursuing his common law remedies under the saving to suitors clause. Unlike the defendant in *Linton*, Petitioner has an independent jurisdictional basis to be in federal court, *i.e.* exoneration from and limitation of liability.

The appropriate analysis of this case is found in *Complaint of S&E Shipping Corp.*, 1982 A.M.C. 2940 (N.D. Ohio 1982) and *In re Eagle Marine Industries, Inc.*, No. 4:97CV0357 ERW (E.D.Mo. October 16, 1997). Both *S&E Shipping Corp.* and *Eagle Marine* persuasively reason that if a claimant does not assert in his state court action a remedy that he is otherwise denied by being in the admiralty court, there is no real conflict between the saving clause and the petitioner's right to exoneration and limitation. Because Claimant has waived his right to trial by jury in the state court, he is not being deprived of any remedy within the meaning of the saving clause that he does not otherwise have in the limitation action. Indeed, the remedy sought in both the Illinois state court action

and the federal limitation proceeding is the same, *i.e.* a bench trial without a jury.

In his Brief, Claimant fails to effectively distinguish this case from *S&E Shipping* and *Eagle Marine*. Rather, Claimant simply contends that *S&E Shipping* and *Eagle Marine* are not applicable because the limitation funds in those cases were inadequate and, therefore, this Court should apply the decision of *Curtis Bay*. As set for [sic] in Section I.A. above, the fact that this may be an adequate fund case is of no consequence to the analysis because Petitioner still has the right to have the issue of exoneration decided by the federal court. Moreover, as set forth above, *Curtis Bay* is simply inapposite.

II. This Court Should Reverse The District Court Decision To Stay Petitioner's Exoneration From And Limitation Of Liability Proceeding And To Lift The Stay Imposed On Litigation Because Claimant's New Proposed Stipulations Fail To Adequately Protect Petitioner's Rights.

In a belated attempt to comply with requirements set forth in *Jefferson Barracks Marine Serv. Inc. v. Casey*, 763 F.2d 1007 (8th Cir. 1985), Claimant has requested leave to "clarify" his stipulations. Even if this Court were to grant leave for this clarification, the new stipulations proposed by Claimant remain inadequate. Specifically, Claimant has not filed or offered to file stipulations signed by him. This is especially important given the fact that the new proposed stipulations were belatedly offered in response to Petitioner's Appellate Brief and may not reflect the true desires of the Claimant.

Moreover, the new proposed stipulations do not protect Petitioner's right to have the issue exoneration decided in federal court. As set forth in the cases cited in Section I.A. above, such stipulations are a prerequisite to dissolving a stay order. Because Claimant continues to refuse to sign a stipulation acknowledging the federal court's jurisdiction over the issue of exoneration, this Court should reverse the district court's opinion.

CONCLUSION

For all of the foregoing reasons and the reasons set forth in Petitioner's opening Brief, the district court's order granting Claimant's Motion to Dissolve should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Counsel files this certificate of compliance pursuant to Rule 32(a)(7)(C), Federal Rules of Appellate Procedure and Rule 28A(c), 8th Circuit Rules of Appellate Procedure. The undersigned certifies that the Reply Brief of Appellants Lewis & Clark Marine, Inc. contains 3,541 words, as certified by Microsoft Word for Office, version number 97SR-1, word count.

Further, pursuant to 8th Cir. R. App. P. 28A(d), the undersigned certifies that he filed herewith a 3 1/2 inch computer diskette containing the full text of this brief. The label on the diskette includes the case name and the docket numbers. Further, one copy of the diskette has been served on the counsel for the Appellants/Cross-Appellees Computrol, Inc. as indicated on the Certificate of Service attached hereto. The undersigned certifies that the diskette has been scanned for viruses using Cheyenne Inoculan AntiVirus Software, and to the best of his knowledge and belief, that it is virus free.

By: Jeana D. McFerron
Jeana D. McFerron

[Certificate Of Service Omitted In Printing]

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 99-1346

IN THE MATTER OF THE COMPLAINT
OF LEWIS & CLARK MARINE, INC.

Appellant,

v.

JAMES F. LEWIS

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF MISSOURI

Case No. 4:98CV0503 (MLM)
The Honorable Marry Ann L. Medler,
U.S. Magistrate Judge

PETITION FOR REHEARING AND/OR REHEARING EN BANC

FRAP RULE 35(a) STATEMENT

The panel decision has created an exceptional conflict in the law because the significant federal interests governing vessels are now subject to conflicting rules on the Mississippi River. Because states exercise concurrent jurisdiction over that river the authority of this Circuit literally overlaps, with that of the Seventh and Fifth Circuits. The effect of the panel decision is to impose opposing rules of law simultaneously on every vessel on the majority of the Mississippi River. This exceptional circumstance should not arise except by consideration of the Court *en banc*.

The question presented by this case is whether a vessel owner in an adequate fund/single claimant limitation of liability case can enjoin a claimant's state court Jones Act action under any circumstances and, if so, whether the injunction must nonetheless be dissolved pursuant to the Saving To Suitors clause of 28 U.S.C. §1333(2)? The panel decision answered the former question in the affirmative and the latter question in the negative. These holdings conflict with unequivocal precedent from the United States Supreme Court. *Langnes v. Green*, 282 U.S. 531 (1930); (injunction must be dissolved in single claimant limitation case); *Lake Tankers v. Henn*, 354 U.S. 147 (1957) (injunction must be dissolved in adequate fund limitation case); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924) (non jury case is within saving to suitors clause).

The panel decision also conflicts with this Circuit's prior opinions in *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir. 1979), *Jefferson Barracks Marine Service v. Casey*, 763 F.2d 1007, 1011 (8th Cir.1985), and *Helena Marine Service, Inc. v. Sioux City Marine*, 564 F.2d 15, 18 (8th Cir.1977).

This cause is therefore within the ambit of Rule 35(a)(1), FRAP.

Appellee respectfully submits that this case is also within the narrow class of cases under FRAP Rule 35(a)(2) that involve questions of exceptional importance because the panel decision conflicts with decisions of other United States Courts of Appeals in *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2d Cir. 1947), *Port Arthur Towing Co. v. John W. Towing, Inc.*, 964

F.2d 157 (5th Cir.1995), *S & E Shipping Corp. v. Chesapeake & Ohio Railway Co.*, 678 F.2d 636 (6th Cir. 1982), *In the Matter of McCarthy Brothers Company/Clark Bridge*, 83 F.3d 821 (7th Cir.1996), *Anderson v. Nadon*, 360 F.2d 53 (9th Cir.1966), and *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11th Cir. 1996). The panel decision also conflicts with the Fifth Circuit's decision in *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480 (5th Cir. 1992) (non jury state court case within saving to suitors clause).

PETITION FOR REHEARING AND SUGGESTIONS FOR REHEARING *EN BANC*

In this case, the seaman-claimant stipulated that his claim was less than the value of the vessel and limitation fund. There were no other claimants. These facts triggered both of the exceptions to the rule of exclusive federal jurisdiction over limitation proceedings.

The panel decision conflicts with this Court's decisions, the Supreme Court's decisions and cases from the Second, Third, Fifth, Seventh, Ninth and Eleventh Circuits. This departure from maritime uniformity should be addressed by this Court, *en banc*, because considerations of national concern are implicated.

The federal courts have traditionally acted to maintain the uniformity of admiralty and maritime law. *See, e.g., Harbor Tug & Barge Co.*, 529 U.S. 548 (1997); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1990). This concern has embraced the specific issues raised by this case. *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109, 124 (1924) (non jury case is

within saving to suitors clause); *Langnes v. Green*, 282 U.S. 531 (1930) (injunction must be dissolved in single claimant limitation case); *Lake Tankers v. Henn*, 354 U.S. 147 (1957) (injunction must be dissolved in adequate fund limitation case).

These were well-settled principles in this Circuit. "In the case of either a single claim or of multiple claims that do not exceed the limitation fund, however, the district court's discretion is narrowly circumscribed. The District Court **must dissolve the injunction** unless the owner can demonstrate that his right to limit liability would be prejudiced." *Universal Towing Co. v. Barrale*, 595 F.2d 414, 420 (8th Cir. 1979) (emphasis added); see also *Jefferson Barracks Marine Service v. Casey*, 763 F.2d 1007, 1011 (8th Cir.1985); *Helena Marine Service, Inc. v. Sioux City Marine*, 564 F.2d 15, 18 (8th Cir.1977).

These rules are also accepted by every other Circuit to consider them. *Kreta Shipping S.A. v. Preussag International Steel Corp.*, ___ F.3d ___, slip op. September 13, 1999 (2d Cir.1999); *Curtis Bay Towing Co. v. Tug Kevin Moran, Inc.*, 159 F.2d 273 (2d Cir. 1947); *Port Arthur Towing Co. v. John W. Towing, Inc.*, 964 F.2d 157 (5th Cir.1995); *S & E Shipping Corp. v. Chesapeake & Ohio Railway Co.*, 678 F.2d 636 (6th Cir. 1982); *In the Matter of McCarthy Brothers Company/Clark Bridge*, 83 F.3d 821 (7th Cir.1996); *Anderson v. Nadon*, 360 F.2d 53 (9th Cir.1966); *Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11th Cir. 1996).

There is no question that the cause *sub judice* is both a single claim and an excess fund case. Yet, the panel decision abandoned the precedent of this Court and of

the Supreme Court. No reported case supports the rationale of the panel decision.

The panel decision focused on the failure of the state court action to provide a remedy that was unavailable in the federal court. This is not the appropriate analysis under *Lake Tankers*. The initial inquiry is whether the injunction is necessary to protect any federal right, not whether there is an otherwise unavailable remedy in state court. "Since the total amount of all potential claims in each case was only a fraction of that limit, the fund available for their satisfaction was more than ample. There was no reason, therefore, for permitting the petitioners to invoke a forum concursus." *Black Diamond Steamship Corp. v. Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 392, 93 L.Ed. 754, 69 S.Ct. 622 (1949).

A recent Second Circuit case notes the continuing vitality of the *Lake Tankers* doctrine:

> [T]here is nothing in what the [Supreme] Court said from which we can conclude that the conflict between the Limitation Act and the saving-to-suitors clause is the sole foundation on which the rule requiring the concursus injunction to be lifted lies. The Court's decision was based instead principally on the perception that once the shipowner's right of limitation was protected and there was no need to marshal assets to apportion an inadequate fund among many claimants, the concursus injunction no longer served a valid purpose. Once, for that reason, the injunction is vacated, it does not matter whether a claimant takes advantage of its freedom from the injunction by bringing suit in a state court pursuant to the saving-to-suitors

clause, or a foreign court – or elsewhere for that matter." *Kreta Shipping S.A. v. Preussag International Steel Corp.*, ___ F.3d ___, slip op. September 13, 1999 (2d Cir.1999), at pp. 18-19.

Because the claimant stipulated in the instant case that his claim was less than the value of the owner's vessel, the owner no longer had any federal interest to protect. This is the analytical touchstone under *Lake Tankers,* yet the panel decision failed to follow this controlling analysis.

As a result of the panel decision, vessels plying the Mississippi River cross into a different set of maritime rules when they pass into Mississippi from Arkansas. In the large section of the Mississippi River which passes between states in the Seventh Circuit and states in the Eighth Circuit, the jurisdiction over the river is concurrent. See, e.g., Statute of April 18, 1818, ch. LXVII, sec. 2, 3 Stats. at L. 428 (1818). This statute provides, in part, for Illinois to have "concurrent jurisdiction on the Mississippi River, with any state or states to be formed west thereof, so far as said river shall form a common boundary to both." *People v. Pitt*, 106 III.App.3d 117, 435 N.E.2d 801, 802, (Ill.App. 5 Dist. 1982); see also *State v. George*, (Minn. 1895), 60 Minn. 503, 63 N.W. 100 (concurrent jurisdiction attaches to vessels on river).

The panel's decision has therefore erected a conflicting set of rules over the same body of water and abandoned established precedent of this Court and of the

United States Supreme Court. In this circumstance, consideration *en banc* is warranted.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Plaintiff(s),)
)
vs.) Case No. 4 98 CV 00503 MLM
Defendant(s).)

CONSENT TO JURISDICTION BY UNITED STATES MAGISTRATE JUDGE

In accordance with the provisions of Title 28, U.S.C. Sec. 636(c)(1), the undersigned (party") (counsel of record for Plaintiff) in the above-captioned civil matter hereby voluntarily consents to have a United States Magistrate Judge conduct any and all further proceedings in the case, including trial and entry of a final judgment, with direct review by the Eighth Circuit Court of Appeals if an appeal is filed.

Date: 5/8/98 /s/ Christopher C. Swenson
Signature

Print Name: Christopher C. Swenson

DISTRICT JUDGE OPTION

Pursuant to Title 28, U.S.C. Sec. 636(c)(2) the undersigned (party") (counsel of record for _____) in the above captioned civil matter acknowledges the availability of a United States Magistrate Judge but elects to have

this case randomly assigned to a United States District Judge.

Date: _____ _____
Signature

Print Name: _____

_____